Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1993

GOLDEN VALLEY
LUTHERAN COLLEGE, and
LUTHERAN BIBLE INSTITUTE
OF MINNEAPOLIS,

Petitioners,

v.

CITY OF GOLDEN VALLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to damages caused by a temporary taking where a city moratorium "freezes" the use of real property to a use (a specific college campus) which no longer exists and where the moratorium ordinance prohibits the request of variances or exceptions during its term.

2. Whether a non-profit corporation is entitled to apply the factors of Penn Central to determine if compensation is required for damages due to a temporary moratorium?

3. Whether petitioners' due process rights were violated where the district court judge refuses to recuse herself, though a material witness is her brother-in-law?

LIST OF PARTIES

All parties to this petition are listed in the caption.

Norwest Bank and the Minnesota Higher Education Facilities Authority, listed in some of the pleadings, were dismissed by stipulation in 1991.

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No._____

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GOLDEN VALLEY LUTHERAN COLLEGE, and
LUTHERAN BIBLE INSTITUTE OF MINNEAPOLIS,
Petitioners,

v.

CITY OF GOLDEN VALLEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioners, Golden Valley Lutheran College, and Lutheran Bible Institute of Minneapolis petition for a writ of certiorari issue to review the judgment of the Minnesota Supreme Court that upholds the Minnesota Court of Appeals decision in this case.

OPINIONS BELOW

The Minnesota Court of Appeals decision is an unpublished opinion, dated January 25, 1994, and a copy of that opinion is included in the Appendix to the instant Petition as Appendix I. The Minnesota Supreme Court entered an order denying discretionary review of the Minnesota Court of Appeals decision on March 15, 1994. A copy of that order is included in the Appendix to the instant Petition as Appendix J. The opinion of the Hennepin County District Court, Fourth Judicial District, was issued June 7, 1993. A copy of that opinion is included as Appendix F.

JURISDICTION

The Minnesota Supreme Court entered an order denying discretionary review of the Minnesota Court of Appeals decision on March 15, 1994. This Petition for Writ of Certiorari has been filed within the allowable ninety days from that date. This court's jurisdiction is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment provides, in part:

> . . . nor shall any State deprive any person of . . . property, without due process of law; . . . .

STATEMENT OF THE CASE

Petitioners, Golden Valley Lutheran College, and Lutheran Bible Institute of Minneapolis, owned and operated a two year college on a thirty-one acre campus in the City of Golden Valley, Minnesota since 1961. (See, District Court Opinion, App. F-3). For all times pertinent to this matter, the property upon which the College was located was subject to a Planned United Development ("PUD") ordinance (sometimes called "contract zoning") which restricted the use of the property to "college campus buildings including a classroom building, five dormitory buildings, and a commons building." (App. L-3). The PUD further provided that the population component of the property would consist of "approximately 560 students * * * housed in the five dormitories on the Golden Valley Lutheran College Campus." (App. L-6). Any other use of the property was in violation of this restrictive ordinance. The full text of this PUD is found in Appendix L.

In 1985, the college board of trustees, faced with overwhelming financial difficulties decided to close the college and sell the property in order to pay the debts of the petitioners estimated at that time to be approximately six million dollars, (App. F-3) much of which was owed to friends and alumni of the college who had loaned it money to enable it to get through difficult financial times or who had invested with expectations of receiving annuities paid back by the college. At the time the college closed in May of 1985, the property was valued from six to twelve million dollars depending on zoning and use. (App. A-8). That same spring, after hearing of the decision to close the campus, the governor of Minnesota and his chief of staff, Terry Montgomery, toured the campus for the purpose of determining if it would be suitable as use for the Minnesota School and Resource Center for the Arts (commonly referred to as the Minnesota State High School for the Arts). Terry Montgomery was the

brother of the husband of the district court judge, Ann Montgomery. Terry Montgomery testified that the State was considering purchase of the campus for $11-12 million.

Because of the restrictions of the PUD any use other than as a residential college campus, even as a State High School for the Arts, did and would require a change in the contract zoning. When the property did not sell quickly, the bondholders holding a mortgage to the property brought a foreclosure action. (App. F-3). The parties to the foreclosure action entered into a stipulation whereby Petitioner could try to sell the property, and Petitioner entered into purchase agreements to sell the property for an amount in excess of six million dollars. (App. F-4).

There is a considerable amount of controversy concerning respondent's behavior with regard to the proposed purchasers of the property. Petitioners contended that respondent engaged in a continuing course of action to thwart its efforts to sell the property. Specifically, petitioners argued that the City Manager arbitrarily imposed unnecessary conditions on the prospective purchasers, withheld information from city council, unnecessarily delayed important meetings, and harassed and intimidated their representatives to withdraw from developing the campus site. Respondent denies that this occurred.

While all of this occurred, respondent was conducting a traffic study for a major interstate highway project which ran along the south border of the city, more than a mile away from petitioners' property. In December of 1987, respondent announced that it was contemplating a one-year moratorium on development, ostensibly around the highway project but including the college campus. (App. F-5). Petitioners' representatives appeared before city council and urged city council not to include the campus within the moratorium area. Even though respondent's representatives were well aware of petitioners' severe financial problems and need to sell its

property, and the city planning commission had recommended that the campus be excluded from the moratorium, the City enacted the proposed one year building moratorium and included the property within the moratorium. The moratorium prohibited even a request to the City for a variance or waiver of the severe restrictions on the property. The moratorium stated, in par. 2.02, "No applications for amendments to the Comprehensive Plan, rezonings or other land use related approvals affecting property in the Study Area shall be accepted or considered. (App. K-4).

The imposition of the moratorium also ignored the fact that all the traffic studies which were the stated purpose for the moratorium had already been completed. (App. F-5). The ordinances enacted as a result of the study did not come close to the campus property. Yet, despite the knowledge the City had regarding the harm the moratorium would cause the petitioners, and the fact that the traffic studies really had nothing to do with the streets or highways around the college property, the City refused to exclude the campus from the property. No other proposed development in the City was affected by the moratorium.

The sale of the property was dependant upon it being rezoned for other reasonable uses (apartments, senior housing, and offices). As a result of this moratorium, together with the restrictive nature of the PUD concerning the property, the prospective purchasers of the property were unable even request approval of their plans to develop petitioners' property. (App. K-4). Subsequently, petitioners lost their property through foreclosure proceedings.

The property was ultimately leased by the bondholders and then sold to the State of Minnesota for use as the School for the Arts as originally contemplated in 1985 by the governor and his chief of staff, Terry Montgomery. (App. F-6). On August 15, 1989, after petitioners had lost ownership to the property, the City amended the PUD to specifically

allow the use of the campus by the Minnesota Resource Center for the Arts (Arts High School).

In May of 1989, Petitioners filed the instant action in State of Minnesota, District Court, Fourth Judicial District. Petitioners sought damages against the City of Golden Valley, alleging that the city acted arbitrarily and capriciously and that it unconstitutionally took Petitioners' property by enacting a temporary development moratorium that prohibited Petitioners from any reasonable use of the property for sale or development during the critical term of the moratorium. (App. A).

In 1991, the trial court granted motions to dismiss the claims of petitioners against the City of Golden Valley. While pursuing claims against the remaining defendants, petitioners first realized the familial relationship between the judge and Terry Montgomery, the governor's chief of staff, a material witness regarding damages. A motion to disqualify the judge was first made in April of 1991. (See, App. D-2). This motion was denied by the trial court. Subsequently, the claims against the other defendants were settled, judgment was entered in June of 1991 and the matter appealed to the Minnesota Court of Appeals for the first time in July of 1991.

In an unpublished decision, the Minnesota Court of Appeals reversed the decisions of the trial court on all grounds except that of recusal. (App. C). The court held, in the opinion filed December 17, 1991, that the complaint stated a cause of action for an unconstitutional taking and tortious interference. The court of appeals also held the City's counsel disqualified because of its previous representation of petitioners. With respect to the motion made for recusal of the trial court judge, the court of appeals stated, ". . . the circumstances at <u>that</u> <u>time</u> did not merit recusal. (emphasis added). (App. C-7). While the court noted that Canon 3 of the Minnesota Code of Judicial Conduct provided a judge should be disqualified when "the judge or the judge's spouse,

or a person within the third degree of relationship to either of them, or the spouse of such a person . . . is to the judge's knowledge likely to be a material witness in the proceeding," the court concluded, "[w]e find it particularly difficult to perceive how the trial judge's relationship to the alleged potential witness could have affected her previous orders when she was not made aware of the purported conflict until long afterward." (App. C-8).

The City sought review by the Minnesota Supreme Court which was denied on February 10, 1992. On remand, Judge Montgomery again assumed responsibility for the case despite the clarifications and admonitions regarding Canon 3 in the appellate opinion.

Substantial discovery took place after remand. After the deposition of Terry Montgomery was taken, petitioners asked, in an informal letter, for the trial court judge to voluntarily remove herself from this case. The judge did not respond to the request. Petitioners then made a formal motion for her recusal from further consideration in this matter. (App. D). Due to a change in the Minnesota Rules of Civil Procedure, this motion was made to the chief judge of the district, rather than to the trial judge herself. Evidence was submitted that not only was the testimony of Terry Montgomery material, but there were reasons to suspect estrangement between the judge and the witness. The chief judge denied the motion, orally, before the motion for summary judgment was hear, and by a written opinion dated May 3, 1993, which held that the motion should have been made within ten days of the judicial assignment and that the motion was, therefore, untimely. (App. E).

Judge Ann Montgomery then granted the motion for summary judgment on all grounds sought by the City on June 7, 1993. (App. F). Judgment was entered on June 16, 1993. Petitioners appealed to the Minnesota Court of Appeals, which affirmed the trial court decision in an unpublished

decision filed January 25, 1994. (App. I). Petitioners petitioned the Minnesota Supreme Court for review of the decision of the court of appeals. The petition was denied, without comment, on March 15, 1994. (App. J). At all levels of state court, Petitioners argued that their constitutional rights were violated when Respondent took Petitioners' property without just compensation.

Federal Questions Raised Below

The complaint of the petitioners, dated May 12, 1989 (App. A) raised federal questions by alleging, in count one, damages for an improper taking, in violation of the Fourteenth Amendment of the United States Constitution, and in count four, (App. A-5) denial of due process in violation of the Fifth Amendment. (App. A-10).

The district court held, in its memorandum opinion of June 7, 1993, (App. F), that the only reason the property had no economic use is because of the college's own financial difficulties (App. F-10). It held that "[t]he College's financial inability to engage in the allowed use or to secure buyers for the property does not change the fact that some use was possible under the City's ordinance." (App. F-11).

The district court also held that a temporary inability to sell property because of a moratorium or the loss of a particular sale is "simply an 'incident of ownership' and did not render the moratorium a taking." (App. F-18).

The Minnesota Court of Appeals, in its decision of January 25, 1994, (App. I) held that there was no categorical taking because the property could still be used as a college and that the property could still have been sold to prospective buyers who could use the property for a college or to others who could speculate the city would amend the restrictive PUD. (App. I-3).

The court of appeals also held that the three-factors of Penn Central were not met because it found there was no evidence of economic impact on the property by the moratorium. (App. I-4).

The motions of petitioners, requesting recusal of Judge Montgomery, on April 2, 1991, and again on April 23, 1993, because of her familial relationship with a material witness, did not specifically allege federal questions at the time, but are well grounded in the due process required by the Fifth and Fourteenth Amendments to the United States Constitution.

The trial court denied the first motion on the ground, among others, that her brother in law had no "education or training in land valuation which would qualify him to render any expert opinion in this case." Memorandum, May 10, 1991. (See, App. D-3).

The first opinion of the court of appeals, December 17, 1991, seemed to agree that Canon 3 of the Judicial Canons would disqualify a trial judge from acting in a case where she was related to a material witness within the third degree by blood or marriage.

The second motion for disqualification was denied by the chief district court judge in April of 1993, on the grounds that such a motion should have been made within ten days of the judicial assignment (no judicial assignment had been made since 1989), and the motion was therefore untimely. (App. E).

The Minnesota Court of Appeals ruled, in its second opinion, on January 25, 1994, that because the judge's husband had died earlier in 1993, "a removal motion could not rest on a family relationship that no longer existed." (App. I-7). The court of appeals also erroneously stated the motion was brought the day before the hearing on the motion for summary judgment. (App. I-7).

REASON FOR GRANTING THE WRIT

This case presents the issue of whether a compensable temporary taking occurs where a city ordinance "freezes" the use of real property to a use that no longer exists. In this case, the moratorium issued by the City of Golden Valley did not allow any changes in a planned unit development which specifically restricted use of the property to the Golden Valley Lutheran College, even though the college had not operated for almost three years.

This case also presents the issue of denial of due process where the lower court judge refused to recuse herself even though a material witness was her estranged brother-in-law.

A. THE STATE COURT DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

This state court decision conflicts with decisions of this Court recognizing that land use regulations can effectuate a "taking" of property for which the state is constitutionally required to pay just compensation. Since at least 1922, this Court has recognized that the taking clause of the Fifth Amendment imposes limits on the state's power to regulate the use of private property. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). This Court has also recognized that the state can be guilty of taking property, in the constitutional sense, even if the regulation is merely a temporary regulatory taking. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

Generally, this Court has engaged in an ad hoc factual inquiry, weighing the competing public and private interests to determine whether a compensable regulatory taking has occurred. See Penn Central Transportation Co. v. City of

New York, 438 U.S. 127, 98 S.Ct. 158, 67 L.Ed.2d 631 (1978). However, this Court has also recognized situations where the state's actions will categorically be treated as a taking. In particular, this Court has held that the state's action will be treated as a taking if the regulation denies all economically beneficial or productive use of the land. See Lucas v. South Carolina Coastal Council, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

1. The Development Moratorium Imposed By Respondent Constitutes a "Taking" Because It Effectively Denied Petitioner All Economically Beneficial or Productive Use of Petitioner's Land.

The PUD (Planned Unit Development) ordinance to which the college property was subject limited the use of the property to that of the Golden Valley Lutheran College. Since the college had gone out of business in 1985 as an active teaching and degree granting institution, petitioners contend that the city's failure to allow changes to this zoning during the time of the moratorium caused, at the very least, a temporary taking, because there was absolutely no legal beneficial use for the property at that time. Even the use of the campus by another college, regardless of how remote that would be in an era of declining college enrollments, would have been in violation of the restrictive ordinance.

The United States Supreme Court, in its prior rulings regarding takings, has consistently ruled that alternative uses for the property must be reasonable. In Lucas v. South Carolina Coastal Council, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the Petitioner bought undeveloped coastal land, with the intention of building single family residences. Before the Petitioner could build these residences, the state passed legislation banning the construction of occupiable improvements within a certain distance from the

shore. Because Petitioner's land was within this area, he was unable to build on his property. This Court held that the legislation banning building of occupiable improvements accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of just compensation. In so holding, this Court recognized that a land use regulation is a "taking" if it denies a land owner all economically viable use of his land.

While the district court, in this case, purported to follow Lucas, the holding is clearly contrary to that case and renders it practically meaningless. The state court holding that petitioner had a beneficial use of the property because the property could be used as a college ignores the reality of the situation, the wording of the ordinance, and the holding in Lucas. The property was subject to an extremely limited use, and that limited use ceased to exist when the college was closed in 1985.

The state court's decision distorts and misinterprets Lucas. In Lucas, the holding was not that a taking occurs when the property owner is denied all use of his or her property. As Justice Blackman noted in his dissent to Lucas, the property owner there could picnic, swim, camp in a tent, or live in the property in a movable trailer. Lucas v. South Carolina Coastal Council, 505 U.S. ___, ___, 112 S.Ct. 2886, 2908, (1992) (Blackman, J., dissenting). Rather, the holding in Lucas was that there is a taking when the property owner is denied all economically beneficial or productive use of the land. The opinion of Lucas on remand makes it clear that this applies even to a temporary two year taking.

On remand, Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S. C. 1992), the South Carolina Supreme Court held that "the sole issue on remand from this Court to the circuit level is a determination of the actual damages Lucas has sustained as the result of his being temporarily deprived of the use of his property. Ibid. at S.E. 2d 486. The court also held

that Lucas was deserving of compensation commencing with the enactment of the 1988 Act and continuing through the date of its decision.

The analysis of the Minnesota courts that temporary loss of land is a "simple incidence of ownership" is in direct conflict with the holding of Lucas and First English, particularly where that "temporary" loss results in a substantial hardship or total forfeiture of the property.

Because there was ample evidence in the record of the present case that the temporary moratorium imposed by Respondent left Petitioner with no economically viable use of the property, the state's court decision was contrary to the holding in Lucas and should be reversed.

2. The Development Moratorium Imposed By Respondent Constitutes a Taking Under the Three-Factor Inquiry of Penn Central Transportation Co. v. New York City, 438 U.S. 124 (1978).

Even if this Court finds that the moratorium did not constitute a categorical taking of Petitioner's property, a proper analysis shows that it constituted a taking under Penn Central Transportation Co v. City of New York, Supra. In Penn Central this court noted that whether a restriction which affects the use of property is invalid or requires compensation is a determination made on an ad hoc basis that depends largely upon the particular circumstances in that case. 438 U.S. at 124. The Penn Central Court identified the following significant factors to consider in making ad hoc decisions concerning takings: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Ibid.

a. The Moratorium Had a Devastating Economic Impact on Petitioner.

As described above, Respondent's action had a devastating economic impact on appellant. As a direct and foreseeable consequence of Respondent's action, Petitioner was unable to sell its property and ultimately lost it through foreclosure. Prior to enactment of the moratorium, Petitioner could expect to sell its property (and had entered into purchase agreements for such sale) at a price in excess of six million dollars. After enactment of the moratorium, it was impracticable to sell the College's property as there was no assurance that the City would change the zoning to an economically viable use.

Both the district court and appellate court decisions contended that any losses suffered by the petitioners must have been a result of petitioners' own precarious finances. The financial impact upon individual claimants is, of course, the essence of the first factor of the Penn Central test. For the Minnesota courts to ignore this factor is in conflict with the decisions rendered by this Court.

b. The Moratorium Completely Thwarted Petitioners' Reasonable Investment Backed Expectations.

A fundamental expectation in real estate investment is that when one is no longer willing or able to operate the property that one will be able to sell the property and, hopefully, recoup one's investment plus make a profit. In April of 1987, Petitioners fully expected to be able to sell their property for more than six million dollars. This expectation was thwarted when Respondent enacted a development moratorium that prohibited prospective purchasers from using the property for

anything other than the extremely limited and by then obsolete, use set forth in the PUD.

The decision of the Minnesota courts seems to imply that a non-profit corporation, such as Golden Valley Junior College, is incapable of having any "investment-backed expectations" for the property it owns. This, of course, again is in conflict with existing case law. Certainly the decision in the First English case should have made it clear that nonprofits are entitled to their expectations in real property the same as any other entity.

The opinions seem also to imply, as suggested by respondent, that the term "investment-backed expectations" requires something akin to a half-completed structure before this clause applies. That view is unfounded.

In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), a coal company had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal underneath. A subsequent state statute prohibited the mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal. Because the statute made it commercially impractical to mine this coal, this was deemed a violation of the expectation. See, Penn Central, 438 U.S. at 127.

In this situation, the college, and the many friends and alumni who had "invested" in it with loans certainly expected that, at the very worst, the college would be able to pay off its large debt with the sale of its campus. The actions of the City, which prohibited this from happening constitute, at the very least, a taking which should be compensable.

c. The Character of Respondent's Action in Including Petitioners' Site Within the Moratorium Was Not Necessary to Promote the Common Good.

The public interest in including petitioners' property within the boundaries of the moratorium was insubstantial or practically non-existent. Petitioners' property was included in the moratorium, while property immediately across the street from petitioners' property was not included in the moratorium area. Including petitioners' property within the area was merely an arbitrary decision made by respondent and its refusal to exempt petitioners' property was unreasonable and served no purpose other than to thwart petitioners' efforts to realize its reasonable economic expectation to sell its property for a reasonable price.

The trial court noted the petitioners' protestations that the traffic study, which was the ostensible purpose of the moratorium had already been completed prior to the imposition of the moratorium and that the subsequent ordinances, allegedly based on these traffic studies, did not even come close to including the campus property, as mere "hindsight evaluation". (App. F-12). The decisions of this Court require a more thoughtful analysis.

B. DUE PROCESS RIGHTS ARE VIOLATED WHERE THE MINNESOTA COURTS DO NOT REQUIRE RECUSAL OF A JUDGE RELATED TO A MATERIAL WITNESS.

The disqualification of judges for an actual or perceived interest in a case has been ruled by this court to be a constitutional principal. Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 148, 89 S.Ct. 337, 21 L.Ed.2d 301, 304 (1968). This case also states, ". . . any tribunal

permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." Ibid. 393 U.S. at 149, 21 L.Ed.2d at 305.

The Minnesota Court of Appeals, in its decision filed January 25, 1994, held the relationship between Judge Ann Montgomery and witness, former chief of staff to the governor, Terry Montgomery, to be immaterial as the judge's husband had died earlier in the year, in 1993. The court of appeals held that the removal motion could not "rest on a family relationship that no longer existed." (App. I-7).

Some older cases do hold that judicial disqualification ceases upon death of the connecting relative. Zimmerer v. Prudential Ins. Co. 150 Neb. 351, 34 N.W.2d 750 (1948). Even these cases, though, emphasize that the cessation is effective only if the death precedes the commencement of this action. Ibid. That was not the situation here where the judge had previously denied a motion to disqualify herself and the matter went up on its first appeal and most of the case finished on remand, prior to the death of the judge's husband.

Clearly, due process requires the judge should have disqualified herself. The failure of the chief judge of the district court to order disqualification was also a denial of due process. The decision of the Minnesota Court of Appeals that the recent death of the judge's husband rendered the issue moot is insupportable.

CONCLUSION

For the foregoing reasons, petitioners respectfully request the Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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Case Type: Other

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

GOLDEN VALLEY LUTHERAN COLLEGE, and LUTHERAN BIBLE INSTITUTE OF MINNEAPOLIS,

Plaintiffs,

v. **COMPLAINT**

CITY OF GOLDEN VALLEY, MINNESOTA HIGHER EDUCATION FACILITIES AUTHORITY, and NORWEST BANK MINNEAPOLIS, NATIONAL ASSOCIATION,

COURT FILE NO._____

Defendants.

Plaintiffs, for their complaint against defendants, state and allege as follows:

(INTRODUCTORY)

1. Plaintiff, Lutheran Bible Institute of Minneapolis, is a Minnesota nonprofit corporation, duly authorized under the laws of the State of Minnesota. It is a religious institution with offices, for the period of time referred to in this

complaint, at 6125 Olson Memorial Highway in the City of Golden Valley, Minnesota.

2. Plaintiff, Golden Valley Lutheran College, is a Minnesota nonprofit corporation, duly authorized under the laws of the State of Minnesota, which is affiliated with Lutheran Bible Institute and operated, until May of 1985, a two year junior college, with its campus located at 6125 Olson Memorial Highway in the City of Golden Valley, Minnesota.

3 Defendant, City of Golden Valley, is a municipal corporation organized and existing in accordance with Minnesota law, and exists within the County of Hennepin, State of Minnesota.

4. The defendant, Minnesota Higher Education Facilities Authority, is an agency of the State of Minnesota created and established by virtue of Minn. Stat., § 136A.25, et seq. with its principal offices located at St. Paul, Minnesota.

5. Defendant, Norwest Bank Minneapolis, National Association (Norwest Bank), is a banking corporation duly authorized to conduct banking within the State of Minnesota with its main offices located at Minneapolis, Minnesota, County of Hennepin.

6. In or about the spring of 1985, it was determined that the college could no longer viably operate, because of economic circumstances. Furthermore, because of the obligations on the property and its inability to continue, the decision was made by the trustees to sell the campus property.

7. On April 4, 1977, the Minnesota Higher Education Facilities Authority ("MHEFA") for, and in consideration of the sum of Two million Seventy Thousand Dollars ($2,070,000.00), issued its Two Million Seventy Thousand Dollars ($2,070,000.00), Minnesota Higher Education Facilities Authority First Mortgage Revenue Bonds, Series S (Golden Valley Lutheran College), which bonds were formally dated April 1, 1977, pursuant to Minn. Stat., § 136A.25, et seq.

8. In order to secure payment of the bonds, the authority and Norwest Bank Minneapolis, National Association, as trustee, pursuant to Minn. Stat., § 136A.33, entered into a mortgage trust indenture dated March 1, 1977, wherein the authority mortgage to the trustee, as trustee for the benefit of the holders of the bonds, the following described property, located in the County of Hennepin, State of Minnesota, to wit:

Parcel 1

All that part of the Northwest Quarter of the Southwest Quarter of Section 33, Township 118 North, Range 21 West of the 5th Principal Meridian which lies South of the 6th Avenue North, except Railroad right-of-way and except that part of the East 301.87 feet of the West 546.57 feet of the above described property lying North of the South 555.37 feet thereof;

Parcel 2

Lots 2 and 3, Block 3, Tralee except that part of said Lot 3 lying Easterly of the following described line: Beginning at a point in the Northerly line of said Tralee, 20.3 feet West of the Northeast corner of said Lot 3; thence Southeasterly on a course parallel to the Easterly line of said Lot 3 and same extended to a point of intersection with the East line of said Lot 3;

Parcel 3

Lots 8, 9, 10 and 11 in Block 3, Outlot 1; all in WESTCHESTER, including all of vacated Douglas Drive North shown on the plat of WESTCHESTER;

Together with an easement for road purposes for the benefit of the above Parcels 1, 2 and 3 described as follows to-wit: The North 40 feet of the South 782.37

feet of the East 301.87 feet of the West 546.57 feet of the Northwest Quarter of the Southwest Quarter of said section. Also that part of the East 40 feet of the West 384.70 feet of the Northwest Quarter of the Southwest Quarter lying North of the South 782.37 feet thereof and South of the Southerly line of the State Highway No. 55. Also that part of the Northwest Quarter of the Southwest Quarter, described as follows:

Beginning at a point 496.57 feet East of the West line and 782.37 feet North of the South line of said Northwest Quarter of the Southwest Quarter, thence East parallel with the South line of said Northwest Quarter of the Southwest Quarter a distance of 50 feet; thence North parallel with the West line of said Northwest Quarter of the Southwest Quarter a distance of 60 feet; thence Southwesterly to the point of beginning. All in Section 33, Township 118, Range 21;

Together with a perpetual easement for water main and water facility purposes for the benefit of the above Parcels 1, 2 and 3 as described in Doc. No. 819368, Files of the Hennepin County Registrar of Titles;

Subject to restrictions, reservations and easements of record, if any;

Which property is registered with the Registrar of Titles in and for the County of Hennepin, State of Minnesota on Certificate of Title No. 544482.

9. The property in question was leased, by a lease dated March 1, 1977. MHEFA leased the real property mortgaged under the indenture to Golden Valley Lutheran College for a term ending April 1, 1997, with an option to purchase the

leased property for the amount of Five Hundred Dollars ($500.00), pursuant to Section 10.03 of the Lease Agreement. In essence, the "Lease Agreement" was actually a mortgage of the property, previously owned by the plaintiffs and conveyed to the Minnesota Higher Education Facilities Authority for purposes of financing, pursuant to Minn. Stat., § 136A.25, et seq.

10. Pursuant to the terms of the Lease, Golden Valley Lutheran College paid all installments due on the lease until April 1, 1985. The college has failed to pay the additional payment since that time, because of economic circumstances.

11. Since that time, the plaintiffs have attempted to both lease or sell the property. These actions, however, have been improperly prohibited or frustrated by the actions of the defendants.

COUNT ONE
(MORATORIUM - IMPROPER TAKING)

Plaintiffs reallege each and every other paragraph of this complaint.

12. while the plaintiffs were attempting to sell or lease the former campus of Golden Valley Lutheran College, the City of Golden Valley, on the 15th day of March, 1988, issued a blanket moratorium ostensibly for the purpose of analyzing the impact of the construction of Interstate Highway 394 on the south edge of the city.

13. The moratorium, known as Interim Ordinance No. 707, declared that "no building permit shall be issued for any property located in the City of Golden Valley lying ... " in a certain area. This area covered by the moratorium, included the campus of Golden Valley Lutheran College, even though the campus was a significant distance from the highway project.

14. The stated purpose of the Ordinance, No. 707, was to study the effects of the construction of Interstate Highway 394 along the southern border of the City of Golden Valley. However, none of the campus is located in the property running along the southern border of the City of Golden Valley.

15. The Ordinance, in Section 1.01, states that the City of Golden Valley is a "aware of the hardship that a complete prohibition would impose on the landowners." Nevertheless, the ordinance was adopted on the 15th day of March, 1988.

16. As a result of the adoption of this ordinance, it became impossible to sell or develop the campus or to lease the campus of Golden Valley Lutheran College for any reasonable or significant purpose. As a result, the plaintiffs suffered serious and substantial harm in an amount not yet fully calculated but estimated to be in excess of Fifty Thousand Dollars ($50,000.00).

17. The campus of Golden Valley Lutheran College is located in area in the City of Golden Valley which is substantially developed and the property is suitable for development only in terms of a large - scale development, including office towers or multiple-unit residential developments. The campus is located within one-half mile of the intersections of Highways 55 and 100, intersecting in the City of Golden Valley. The property contains no significant or unimprovable bad soil or other condition creating an impediment to this development.

18. As applied to the campus of Golden Valley Lutheran College, the moratorium is arbitrary and capricious and unreasonably delayed development of the property. There was no reasonable basis for the application of the moratorium to the college property, other than to frustrate the efforts of plaintiffs to sell or develop the property.

19. Plaintiffs protested the inclusion of the property to the Golden Valley City Council. However, despite such

protest the council added the property to the moratorium concerning development of the I-394 corridor, even though there was no substantial impact by development of the property upon the I-394 corridor. The actions of the City Council made it clear that any attempt to release the property from the moratorium would have been futile.

20. The plaintiffs were denied any reasonable use of the property for sale or development during the term of the moratorium.

21. As a result of the moratorium plaintiffs, prospective purchasers or tenants have abandoned their interest in the property.

22. The moratorium and/or the enabling statute, Minn. Stat., § 462.355, et seq., are illegal as they are contrary to and in violation of Article I, Section 7 of the Constitution of the State of Minnesota and the Fourteenth Amendment to the Constitution of the United States.

23. As a direct and proximate consequence of the legal or invalid application of the moratorium to the property, plaintiffs have suffered direct, incidental, and consequential damages, including loss rentals, lost profits, denial of any reasonable use of the property, carrying costs of property and attorney's fees and disbursements, in excess of Fifty Thousand Dollars ($50,000.00).

24. To the date of this complaint, no proposed project has been built on the property because of the actions of defendants. Even though the taking of property by issuance of the moratorium was temporary, such taking without compensation was in violation of the applicable provisions of the United States and Minnesota Constitutions, for which compensation, not yet fully calculated, but estimated to be in excess of Fifty Thousand Dollars ($50,000.00) must be given.

COUNT TWO
(BUSINESS DEFAMATION AND PROPERTY DEFAMATION)

Plaintiffs reallege each and every other paragraph of this complaint.

25. Development of the project has been significantly frustrated by the City of Golden Valley, its officers, employees, and agents, in engaging in a course of business slander and property defamation, causing several potential purchasers to back away from the project, all to the substantial harm of the plaintiffs.

26. Specific examples include the following: The City of Golden Valley, its officers, employees, and agents, on a number of occasions, and to a number of different people discouraged the past and present conduct of the plaintiffs, in the operation of the college, and insinuated that the management of the plaintiff institution was improper, and indicated to various people that the asking price of the property was too high.

27. The City of Golden Valley, its officials, officers, employees, and agents, furthermore engaged in a course of conduct designed to frustrate potential developers and to drive down the potential asking price of the project. Despite several appraisals which indicated the property could be worth in the range of $8 million to $10 million, the City of Golden Valley stated to a number of people that the campus was not worth more than $3.5 million.

28. Because of the size and location of the campus, and because of the ordinances of the City of Golden Valley, any feasible use of the campus for development would have to be approved by the City of Golden valley with a planned unit development ordinance. Furthermore, the cooperation of the City of Golden Valley was necessary for tax increment financing. This financing, which presented no risk to the City

of Golden Valley, was necessary for the project and should have been provided. Nevertheless, the City of Golden Valley refused to provide such financing for the project and its officials, officers, employees, and agents, regularly implied that such financing would not be forthcoming in any event. Such refusal was arbitrary and capricious.

29. As a result of these wrongful actions of the City of Golden Valley, its officers, employees, and agents, the plaintiffs have been damaged in an amount not fully calculated but estimated to be in excess of Fifty Thousand Dollars($50,000.00).

COUNT THREE
(SECTION 1983 ACTION)

Plaintiffs reallege each and every other paragraph of this complaint.

30. The actions of the defendants described above and of like character were taken under color and authority of law, and were arbitrary and capricious as a matter of law, and deprived plaintiffs of their right to due process and equal protection under the law in violation of 43 U.S.C. § 1983.

31. The wrongful acts of defendants as set forth above violated plaintiffs' constitutional rights and were done knowingly and with willful indifference to such constitutional rights.

32. As a direct and proximate consequence of these actions, plaintiffs suffered direct, incidental and consequential damages, including lost rentals, lost profits, denial of any reasonable use of the property, carrying costs of the property and attorney's fees and disbursements, in excess of Fifty Thousand Dollars ($50,000.00).

COUNT FOUR
(DUE PROCESS)

Plaintiffs reallege each and every other paragraph of this complaint.

33. The actions of defendants constitute a taking of plaintiffs, property without compensation and without due process of law in violation of Article 1, Section 13 of the Constitution of the State of Minnesota and the Fifth Amendment to the Constitution of the United States.

34. As a result of this denial of due process, plaintiffs were damaged in the amount, not fully calculated, but estimated to be in excess of Fifty Thousand Dollars ($50,000.00).

COUNT FIVE
(MHEFA - BREACH OF CONTRACT)

Plaintiffs reallege each and every other paragraph of this complaint.

35. Pursuant to the refinancing of the property, for purposes of constructing an additional dormitory, known as "Delta" Golden Valley Lutheran College entered into an agreement with Minnesota Higher Education Facilities Authority for a lease pursuant to the Two Million Seventy Thousand Dollar ($2,070,000.00) bond.

36. This lease, dated March 1, 1977, provided for a purchase - lease back situation whereby MHEFA leased to the college the premises, buildings, and improvements, referred to above in paragraph 8 of the complaint.

37. The issuance of the bonds, pursuant to the lease, provided for construction of the additional dormitory space on the campus of the college.

38. In order to give the college a reasonable opportunity to arrange for the sale of the campus property and to preserve

its equity in the property, MHEFA did not terminate the lease immediately and indicated that, pursuant to the provisions of the lease agreement, it would allow a timely and appropriate disposition of the property, by letter dated May 24, 1985.

39. Through mutual agreement of the parties, this extension was continued to allow potential development of the property. This extension was for the mutual benefit of the parties.

40. Despite the assertion of the extension, MHEFA took over control of the dormitories which were partly financed through the funds from MHEFA.

41. By virtue of the lease agreement and the nature of the transaction being that of an equitable mortgage, and extensions allowed by MHEFA, plaintiffs were entitled to have reasonable use of the property for subletting, and potential development.

42. However, in violation of the lease and applicable state law, the MHEFA, consistently denied the plaintiffs the right to sublease the property or to make use of the property for other development, and significantly frustrated the efforts to find a purchaser for the property, prior to expiration of any right of redemption.

43. As a result of these wrongful activities of MHEFA, plaintiffs have been damaged in an amount not yet fully calculated but estimated to be in excess of Fifty Thousand Dollars ($50,000.00).

COUNT SIX
(NORWEST BANK, N.A. - INTENTIONAL INTERFERENCE)

Plaintiffs reallege each and every other paragraph of this complaint.

44. Norwest Bank Minneapolis, N.A., as trustee of the bond holders of the MHEFA, First Mortgage Revenue Bonds,

Series S (Golden Valley Lutheran College), together with MHEFA effectively prohibited use of the dormitory portion of the campus since spring of 1985, after the close of the final quarter in which Golden Valley Lutheran College was operating.

45. Despite the fact that a number of potential leases could have been made, the defendants frustrated and essentially prohibited any subleasing or development of the campus' space.

46. Despite their refusal to allow use of the property, the defendants, Minnesota Higher Education Facilities Authority and Norwest Bank Minneapolis, N.A., have attempted to make the plaintiffs liable for utilities and guard service provided for this portion of the campus.

47. MHEFA originally prohibited the provision of heat to the dormitories. Emergency measures were taken, at the last minute, to avoid damage and freeze-up of the dormitories, but plaintiffs believe that irreversible damage has occurred in the dormitories, caused by the actions of the defendants.

48. As a result of these wrongful actions of defendants, plaintiffs have been damaged in an amount not yet fully calculated, but estimated to be in excess of Fifty Thousand Dollars ($50,000.00).

COUNT SEVEN
(TORTIOUS INTERFERENCE WITH PROSPECTIVE ADVANTAGE)

Plaintiffs reallege each and every other paragraph of this complaint.

49. In the early part of 1985, at the time the college made the decision to discontinue, the campus was appraised at approximately $8 million to $10 million. Shortly after the college began advertising it appeared that there were several potential purchasers interested in purchasing the campus in an

amount, which singlely or jointly, would approximate $8 million to $10 million.

50. Plaintiffs had a valid business expectancy with the reasonable probability of future economic benefit in the sale of the campus for the highest price possible. Defendants knew of this expectancy and said expectancy should have been readily apparent.

51. The defendants, severally and jointly, at various times frustrated the efforts of these purchasers and the plaintiffs so that none of the early proposals for purchase of the property were ever made possible.

52. As a result, it appears that the property is now being listed for a sales price of several million dollars less than what could have been achieved, had the defendants facilitated the proper sale of the property.

53. As a result, plaintiffs have been damaged in an amount not yet fully calculated, but estimated to be in excess of Fifty Thousand Dollars ($50,000.00).

WHEREFORE, plaintiff demands judgment against defendants, each and every one of them, jointly and severally, in an amount not yet fully calculated, but estimated to be in excess of Fifty Thousand Dollars ($50,000.00), together with its costs, disbursements, fees, and interest, and whatever to the Court appears just and equitable.

Dated this 12th day of May, 1989.

MESSERLI & KRAMER

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ATTORNEYS FOR PLAINTIFFS

Acknowledgment

Paul A. Sortland, attorney for the Plaintiff in the above-captioned matter, hereby acknowledges that pursuant to Minn. Stat. Sec. 549.21, costs, disbursements, witness fees and reasonable attorneys fees may be awarded to the Defendant in the event the Plaintiff is found to be acting in bad faith and/or asserting a frivolous claim.

Paul A. Sortland

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

GOLDEN VALLEY LUTHERAN COLLEGE, and LUTHERAN BIBLE INSTITUTE OF MINNEAPOLIS,

Plaintiffs,

v.

CITY OF GOLDEN VALLEY, MINNESOTA HIGHER EDUCATION FACILITIES AUTHORITY, AND NORWEST BANK MINNEAPOLIS, NATIONAL ASSOCIATION,

Defendants.

MEMORANDUM OF LAW OF PLAINTIFF IN SUPPORT OF MOTION TO DISQUALIFY THE HONORABLE ANN D. MONTGOMERY

Court File No. 89-9790

INTRODUCTION

This Memorandum is submitted in support of the Motion of Plaintiff to disqualify the Honorable Ann D. Montgomery from sitting as Judge on this case.

This action was commenced by Golden Valley Lutheran College and Lutheran Bible Institute of Minneapolis against the City of Golden Valley, Minnesota, Higher Education Facilities Authority, and Norwest Bank Minneapolis to remedy damages suffered by Plaintiffs as a result of the wrongful

actions of defendants relating to the Golden Valley Lutheran College site in the City of Golden Valley. Plaintiffs have settled their actions against Minnesota Higher Education Facilities Authority and Norwest Bank Minneapolis. The Court has dismissed the claims of Plaintiffs against the City of Golden valley. Plaintiffs seek reconsideration of the Court's Orders dismissing their complaint against the City of Golden Valley. Before the Court reconsiders the Orders, Plaintiffs respectfully request that the Honorable Ann D. Montgomery disqualify herself from any continuing involvement in this case. This motion to disqualify Judge Montgomery is based upon the recent discovery that an important witness in this case, Terry Montgomery, is the brother-in-law of Judge Montgomery.

ARGUMENT

THE HONORABLE ANN D. MONTGOMERY SHOULD BE DISQUALIFIED FROM FURTHER INVOLVEMENT IN THIS CASE.

Pursuant to the standards set forth in Minnesota Rules of Civil Procedure and the Code of Judicial Conduct, the Honorable Ann D. Montgomery should be disqualified from further involvement in this case. Minnesota Rule of Civil Procedure 63.02 provides that no judge shall sit in any case if the judge is interested in its determination or might by excluded for bias. Minn. R. Civ. P. 63.02 (1990). The Code of Judicial Conduct further provides as follows:

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge or the judge's spouse, or a

> person within the third degree of relationship to either of them, or the spouse of such a person . . . is to the judge's knowledge likely to be a material witness in the proceeding . . . .

Code of Judicial Conduct, Canon 3 (c)(1)(d)(iv) (1990). judge Montgomery should be disqualified because her brother-in-law, Terry Montgomery, will be a material witness in this action. Counsel for Plaintiffs first became aware that Terry Montgomery is the brother-in-law of Judge Montgomery subsequent to the Orders of the Court dismissing the City of Golden Valley from this case. Affidavit of Paul A. Sortland. Terry Montgomery, who is listed as a witness in the Statement of the Case by Plaintiffs, is an important witness relating to the interest of the City and State in making the Golden Valley Lutheran College property the site for the Minnesota School of the Arts. Terry Montgomery is also a material witness to statements by the State and the City relating to the value of the Golden Valley Lutheran College property. Terry Montgomery, as aid of Governor Rudy Perpich, visited the college property with Rudy and Lola Perpich and representatives of the City. During the visit, Montgomery and the others expressed their interest in acquiring the College property for the State School of the Arts and expressed the opinion that the property was worth $11.5 million. A vital ingredient of the judicial system is the absence of the appearance of improprieties which might cause litigants or the public to suspect a lack of fairness or integrity of a judge. Widemann vs. Widemann, 228 Minn. 174, 36 N.W.2d 810 (1949). No judge should ever retain involvement in a case if circumstances exist which create a legitimate appearance of bias even though the judge may perceive himself or herself to be entirely free of bias. State vs. Ketterer, 244 Minn. 127, 69 N.W.2d 115 (1955). Because Terry Montgomery will be a

material witness in this case, the Honorable Ann D. Montgomery should disqualify herself. Minnesota Code of Judicial Conduct, Canon 3 (c)(1)(d)(iv) (1990).

Dated this 2nd day of April, 1991.

MESSERLI & KRAMER

S/S

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ATTORNEYS FOR PLAINTIFFS

RAS:bb2

GOLDEN VALLEY LUTHERAN COLLEGE, et al.,
Appellants,
v.
CITY OF GOLDEN VALLEY, Respondent,
Minnesota Higher Education Facilities Authority, et al.,
Defendants.

No. CO-91-1189.
Court of Appeals of Minnesota.
Dec. 17, 1991.
Review Denied Feb. 10, 1992.

Appeal from District Court, Hennepin County; Ann D. Montgomery, Judge.

Paul A. Sortland, Messerlie & Kramer, Minneapolis, for appellants.

Robert L. Meller, Jr., Cindy J. Larson, Best & Flanagan, Minneapolis, for respondent.

Considered and decided by PARKER, P.J., and KALITOWSKI and FLEMING, (FN*) JJ.

UNPUBLISHED OPINION

PARKER, Judge.

Golden Valley Lutheran College commenced this action in 1989 by filing a seven-count complaint that included claims against the City of Golden Valley for unconstitutional taking of property and tortious interference with prospective business advantage.

Upon a Rule 12.02(5) motion, the trial court (1) dismissed the taking of property claim; (2) required the college to provide a more definite statement for the tortious interference claim; and (3) denied the college's motion to disqualify counsel for the city.

Its claims dismissed, the college moved to disqualify the trial judge from further proceedings. The college also moved for reconsideration of the previous orders dismissing the claims. The trial court responded by denying both the motion to disqualify and the motion to reconsider.

On appeal the college challenges the trial court's refusal to disqualify herself and refusal to reconsider the previous orders. The college alleges that it sufficiently pleaded its claims of tortious interference and taking of property. The college further claims that the city's counsel and the trial judge should be disqualified from the case because of respective conflicts of interest.

DECISION

1. Minn.R.Civ.P. 8.01 sets forth the requirements of a sufficient pleading:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief sought.

The court in Northern States Power Co. v. Franklin noted that Rule 8.01 affects whether the court should dismiss for failure to state a claim under Minn.R.Civ.P. 12.02(5):

One of the fundamental changes intended by the adoption of our Rules of Civil Procedure, particularly as embodied in Rule 8, was to permit the pleading of events by way of a broad general statement which may express conclusions rather than, as was required under code pleading, by a statement of facts sufficient to constitute a cause of action. The functions of a pleading today are simply to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader's theory upon which his claim for relief is based, to permit the application of the doctrine of res judicata, and to determine whether the case must be tried by the jury or the court.

Northern States Power Co. v. Franklin, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963).

"A claim is sufficient against a motion to dismiss under Rule 12.02(5) if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." Id. In reviewing cases dismissed for failure to state a claim, the only question before the court is whether the complaint sets forth a legally sufficient claim for relief. Elzie v. Commissioner of Pub. Safety, 298 N.W.2d 29, 32 (Minn.1980). This court will uphold a dismissal of pleadings "only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." Hedlund v. Hedlund, 371 N.W.2d 232, 234 (Minn.App.1985) (quoting Northern States Power Co., 265 Minn. at 395, 122 N.W.2d at 29).

The college's complaint alleged that the city's moratorium under Interim Ordinance No. 707 effected an unconstitutional taking of the college's property. We agree with the college that its complaint stated at least a minimal claim of temporary

taking and that the trial court erred in dismissing for failure to state a claim.

A land-use regulation will effect a taking of property if it "does not substantially advance legitimate state interests * * * or denies an owner economically viable use of his land." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485, 107 S.Ct. 1232, 1241 (1987) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141 (1980)). This court will find that zoning regulations have effected a compensable taking only when the regulations have deprived the landowner of all reasonable use of the property. Thompson v. City of Red Wing, 455 N.W.2d 512, 517 (Minn.App.1990), pet. for rev. denied (Minn. June 26, 1990).

We note at the outset that the city brought the motion to dismiss in the form of a Rule 12.02 motion under the Minnesota Rules of Civil Procedure. Although the parties may have submitted affidavits to the court, there is no indication that the trial court considered them in dismissing the temporary taking and tortious interference claims. The trial court's memorandum made it clear that it was ruling on a Rule 12.02 motion to dismiss for failure to state a claim upon which relief could be granted.

We believe the trial court prematurely dismissed the college's claim of temporary taking. Paragraph 16 of the complaint states that "[a]s a result of the adoption of this ordinance, it became impossible to sell or develop the campus or to lease the campus of Golden Valley Lutheran College for any reasonable or significant purpose." In deciding whether to uphold the dismissal, we view the pleading, and all inferences derived therefrom, in the broadest sense in favor of the party opposing the motion. In this view the allegation, taken as true, states a claim for relief.

2. The college further claims that the trial court erred in dismissing the claim of tortious interference with prospective business advantage. We believe that the dismissal was error. Interference with prospective business advantage is distinguished from interference with contractual relationships. The court in Furlev Sales & Assoc., Inc. v. North Am. Automotive Warehouse, Inc. set forth the elements for wrongful interference with contractual relationships:

(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages.

Furlev Sales & Assoc., Inc. v. North Am. Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn.1982).

To establish a claim of tortious interference with prospective business relationship, on the other hand, the plaintiff must prove only that the defendant intentionally committed a wrongful act that improperly interfered with a prospective relationship. Hunt v. University of Minnesota, 465 N.W.2d 88, 95 (Minn.App.1991). The Restatement sets forth fully the elements of the tort:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relations, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Restatement (Second) of Torts Sec. 766B (1979), quoted in United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 633 (Minn.1982).

The college's original complaint broadly claimed that the city had interfered with prospective sales of the college's property. In the December 15, 1989, order, the trial court ordered the college to produce a more definite statement concerning the tortious interference claim, including names of those involved and dates on which the alleged conduct occurred. In the more definite statement, the college set forth specific allegations that the city manager and other city officials had misled and discouraged prospective purchasers of the property.

The allegations included in the more definite statement stated a sufficient claim for relief. The trial court stated that the more definite statement failed to state a claim because the college had failed to allege the existence of and interference with a contract. The trial court appears to have confused interference with prospective relationship with interference with contract. Only in the latter must the plaintiff plead and prove the existence of a contract. See Furlev, 325 N.W.2d at 25.

Moreover, the allegations within the more definite statement surely contain sufficient detail and specificity to satisfy our liberal rules of pleading. Under the notice requirements, the plaintiff need not plead each allegation with particularity except in claims of fraud and mistake. See Minn.R.Civ.P. 9.02. The trial court dismissed the pleadings under Minn.R.Civ.P. 12.02, and we do not perceive that the

court intended to convert the proceeding into one for summary judgment. Accordingly, we hold that the trial court erred.

3. The college further maintains that, before ruling on the motion to reconsider, the trial judge should have recused herself because her brother-in-law was a potential material witness. We believe the circumstances at that time did not merit recusal.

Minn.R.Civ.P. 63.02 provides:

No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror. If there is no other judge of the district who is qualified, or if there is only one judge of the district, such judge shall forthwith notify the chief justice of the supreme court of that judge's disqualification.

The Code of Judicial Conduct sets forth criteria for determining whether a judge should disqualify himself or herself because of bias:

A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where * * * the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person * * * is to the judge's knowledge likely to be a material witness in the proceeding.

Code of Judicial Conduct, Canon 3 (1990). A judge should refrain from hearing a case when a litigant has reason to believe that the judge is biased and when another judge is

available to hear the case. State v. Ketterer, 244 Minn. 127, 128, 69 N.W.2d 115, 116 (1955).

The college made its motion to disqualify the trial judge in a purported motion to reconsider in April 1991. We note that the Rules of Civil Procedure do not contemplate such a motion and that it was brought more than a year after the trial court had issued its order in March 1990. We find it particularly difficult to perceive how the trial judge's relationship to the alleged potential witness could have affected her previous orders when she was not made aware of the purported conflict until long afterward.

4. The college argues finally that counsel for the city should be disqualified from representation because of a conflict of interest. Although we believe that neither counsel nor his firm has, at this point, breached any ethical obligation, we hold that because of the great potential for conflict of interest, counsel should discontinue its representation of the city in this matter.

In National Texture Corp. v. Hymes, the supreme court set forth the test to determine whether a conflict exists where a law firm represents a client with interests adverse to a former client of an attorney in the firm:

The test generally applied to determine the existence of a conflict of interest is whether there is a substantial relationship between the subject matters of a pending action and those matters in which the attorney is alleged to have previously represented the client.

National Texture Corp. v. Hymes, 282 N.W.2d 890, 894 (1979). The court in Jenson v. Touche Ross & Co. refined the test into a three-part inquiry:

(a) Considering the facts and the issues involved, is there a substantial, relevant relationship or overlap between the subject matters of the two representations? Hymes, supra.

(b) If so, then certain presumptions apply. First, it is presumed, irrebuttably, that the attorney received confidences from the former client and he or she will not be heard to claim otherwise. Hymes, supra. Second, it is also presumed, but subject to rebuttal, that these confidences were conveyed to the attorney's affiliates. * * *

(c) Finally, at this stage, if reached, the court weighs the competing equities. See, e.g., Woods v. Covington County Bank, 537 F.2d 804, 810, 813 (5th Cir.1976).

Jenson v. Touche Ross & Co., 335 N.W.2d 720, 731-32 (Minn.1983).

To meet the "substantial relationship" test, "the moving party must establish 'that the relationship between issues in the prior and present cases is patently clear * * * [and] the issues involved have been essentially the same.' " Federal Deposit Ins. Corp. v. Amundson, 682 F.Supp 981, 988 (D.Minn.1988) (quoting Williamsburg Wax Museum v. Historic Figures, Inc., 501 F.Supp. 326, 329 (D.D.C.1980) (quoting Government of India v. Cook Indus., Inc., 569 F.2d 737, 739-40 (2d Cir.1978)).

The college claims that the law firm representing the city should be disqualified from the case because it represented the college in matters some years ago. Robert Skare and the law firm represented the college until 1985, and Skare served on the board of regents of the college from 1973 to 1982. Skare participated in obtaining appraisals of the subject property

during the period in which the college attempted to sell its campus. The college maintains that Skare and the firm gained confidential information during this representation and that the firm should be precluded from representing the city as an adverse party. Skare currently is a semi-retired partner of the firm. The trial court declined to disqualify the firm, finding no substantial relationship between matters involved in the earlier representation of the college and the matters concerning the present dispute.

We believe that, as a matter of law, the firm's continued representation of the city presents a potentially serious and irremediable conflict of interest. At trial, the valuation of the property would be a pertinent and contested issue; valuation would be relevant to the college's proof of damages in both the temporary taking and tortious interference claims. The firm's knowledge of the prior appraisals, as well as its access to materials and methods used in those appraisals, would present grave conflict-of-interest concerns. We observe that attorneys experienced in valuation litigation customarily work closely with, and often prepare a written legal basis for, real estate appraisers in dealing with commercial or industrial properties.

We believe that, given the procedural posture of this case, the law firm has breached no ethical obligation and is not yet in a position of conflict of interest. We hold only that in continuing its representation of the city, the ethical position of the firm would become increasingly uncomfortable and, eventually, untenable.

Affirmed in part, reversed in part and remanded.

FN* Retired judge of the district court, acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, Sec. 2.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

GOLDEN VALLEY LUTHERAN COLLEGE and LUTHERAN BIBLE INSTITUTE OF MINNEAPOLIS,

Plaintiffs,

vs.

CITY OF GOLDEN VALLEY,

Defendant.

AFFIDAVIT OF PAUL A. SORTLAND

File No. MC 89-9790

STATE OF MINNESOTA)
)SS.
COUNTY OF HENNEPIN)

Paul A. Sortland, being first duly sworn, deposes and states as follows:

1. This affidavit is submitted in support of the Notice to Remove, submitted to the chief judge in accordance with Rule 63.03 of the Minnesota Rules of Civil Procedure. Plaintiffs allege that Judge Ann Montgomery is automatically disqualified from any further rulings on this matter because of her familial relationship with a material witness. Despite notice of this, Judge Montgomery has twice refused to recuse herself from this action.

2. Affiant is the attorney for the plaintiffs in this matter and has been since the commencement of this action in 1989.

3. One of the material witnesses is this case is Terry Montgomery, who was the chief of staff of Governor Rudy Perpich. In that position, Montgomery dealt with the property owners and the City of Golden Valley regarding possible purchase and use of the property at the time the plaintiffs decided to sell the property in 1985. Valuation of the campus and uses for the campus are critical aspects of this case.

4. Affiant first became aware that Terry Montgomery was the brother of Judge Ann Montgomery's husband in 1991. At that time, affiant moved for the disqualification of the judge from any further rulings in this case on the grounds the judge was automatically disqualified pursuant to Canon 3 (c) (1) (d) (iv). A copy of the motion, memorandum of law and prior affidavit of Paul A. Sortland are attached to this affidavit as Exhibits "A", "B", and "C".

5. Despite this notice, Judge Montgomery refused to disqualify herself. Her decision is attached as Exhibit "D." This and all other aspects of this case were appealed. The Minnesota Court of Appeals reversed all decisions of Judge Montgomery on this matter except the issue of judicial qualification noting only the rules of judicial conduct and that "the circumstances at that time did not merit recusal." (Emphasis added). The court also noted, at page 7 of its opinion, "A judge should refrain from hearing a case when a litigant has reason to believe that the judge is biased and when another judge is available to hear the case." The Opinion is attached as Exhibit "E."

6. I thought it was quite clear, that while the Court of Appeals was not going to say the judge had acted improperly is rendering a decision on one motion for reconsideration after notice of the conflict, the opinion was an unmistakable directive to the trial court that Judge Montgomery should be disqualified from any further rulings in this case.

7. Since the matter was remanded to the trial court, there has been no official notice of judicial officer assignment, though Judge Montgomery has apparently resumed control of the case. The only hearing since remand was a scheduling conference last October. The judge has stated the matter is set for trial on June 14. Defendant has scheduled a motion for summary judgment on April 27, 1993.

8. On April 15, affiant again asked Judge Montgomery to recuse herself from this case. A copy of affiant's letter is attached as Exhibit "F". In response to the earlier criticisms by the judge, a copy of the deposition of Terry Montgomery, taken on February 18, 1993, was enclosed. The deposition transcript is attached as Exhibit "F".

9. The judge has not responded to this letter. The judge also refused to respond to the request for extension of time for briefs contained in that letter, but counsel were advised through the judge's law clerk that, so long as opposing counsel had no objection, the judge wouldn't have a problem with the extension. She did advise, though, that the judge would not sign an order authorizing the extension.

10. Affiant is truly concerned about the judge's attitude in this matter. When first given notice in 1991 that her brother-in-law was a material witness, Judge Montgomery became quite defensive at the hearing and obviously irritated at the suggestion this should be a cause for disqualification. Among other things, the judge:

a. stated she had no communications with her brother-in-law concerning this lawsuit.
b. exclaimed she had not let the relationship influence her in the previous decisions in this case.
c. criticized counsel for not providing any affidavit or statement from her brother-in-law specifically outlining the precise nature and scope of his testimony.

Neither the first two items had been claimed by counsel. I felt that last item was unnecessary at the time. While I still question the need, a copy of the deposition transcript has been provided with this affidavit.

11. While of lesser import to this matter, it should be pointed out affiant has a number of other concerns regarding the judge's bias in this matter.

12. In each of the two previous hearings and the one pre-trial conference in this case, the judge has made a point of addressing opposing counsel by their first names while addressing affiant by his surname. I could understand this at our first meeting as I had never met nor had any contact with Judge Montgomery prior to that date. After the first hearing, though, I felt that such one-sided informality was inappropriate.

13. In each of the first two hearings, the judge made no secret of her disdain for the plaintiffs' case and was unusually sarcastic and argumentative with counsel concerning the two Rule 12 motions to dismiss, which she granted.

14. The court's previous determinations in this matter, dismissing the case for lack of specificity in the pleadings or failure to allege a contract in a claim for tortious interference with prospective advantage, and refusal to disqualify opposing counsel even though it had represented plaintiffs during a critical part of this case, at the same time Terry Montgomery was involved and communication with the law firm about possible purchase of the property in question. The Court of Appeals reversed Judge Montgomery on all this grounds.

15. Regardless, the judge cannot deny her familial relationship with the material witness, Terry Montgomery. Both Canon 3 of the Minnesota Code of Judicial Conduct and Rule 63.03 mandate her disqualification from this action.

Dated this 23rd day of April, 1993.

S/S
Paul A. Sortland

Subscribed and sworn to before
me this 23rd day of April, 1993.

S/S
Notary Public

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Golden Valley Lutheran College and
Lutheran Bible Institute of
Minneapolis,

ORDER AND MEMORANDUM

Plaintiffs,

vs.

File No. MC 89-9790

City of Golden Valley,

Defendant.

The above-entitled matter came on before the Honorable Kevin S. Burke, Chief Judge of District Court, Fourth Judicial District, pursuant to the plaintiff's Notice to Remove the Honorable Ann D. Montgomery, Judge of District Court, from any further proceedings in this matter.

Paul A. Sortland, Esq. submitted a memorandum in support of the removal on behalf of the plaintiff's. Defendant City of Golden Valley appeared by Kelly & Berens, P.A. and Timothy D. Kelly, through a responsive letter dated April 26, 1993.

Based upon all the files, records, and proceedings herein, the court makes the following:

ORDER

Plaintiff's Motion to Remove the Honorable Ann D. Montgomery pursuant to Rule 63.03 of the Minnesota Rules of Civil Procedure is hereby **denied.**

IT IS FURTHER ORDERED that the attached memorandum be made a part of this order.

BY THE COURT S/S

Kevin S. Burke
Chief Judge
Fourth Judicial District

Dated: 5-3-93

MEMORANDUM

The plaintiff, Golden Valley Lutheran College (hereinafter College), has filed a Notice to Remove the Honorable Ann D. Montgomery as the presiding judge in this matter based on the ground that a material witness is her brother-in-law, Terry Montgomery, and that the plaintiffs allege an affirmative showing of prejudice on the part of the judge has been made.

Impartiality is the very foundation of the American judicial system. Payne v. Lee, 24 N.W.2d 259, 263 (Minn. 1946). Canon 3(c) of the Code of Judicial Conduct states that a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

Judges must be sensitive to the appearance of impropriety and should take measures to assure that litigants have no cause to think their case is not being fairly judged. A judge who is able to preside fairly over the proceedings, however, should not be required to step down. McClelland v. McClelland, 359 N.W.2d 7, (Minn. 1984). Litigation even in its most professional sense is a contact sport. Parties have a right to expect that their attorney will vigorously challenge the court and forcefully present their respective positions. However, strong and effective advocacy is not synonymous with attempted judicial intimidation. To be disqualifying, the alleged bias and prejudice of a judge must stem from an extrajudicial source and result in an opinion on the merits. United Stated v. Grinnel Corp., 384 U.S. 536, 583 (1966).

The College first cites Minnesota Rule of Civil Procedure 63.03 as its authority for the Notice to Remove which states:

> Any party or attorney may make and serve on the opposing party and file with the administrator a notice to remove. The notice shall be served and filed within ten days after the party receives notice of which judge or judicial officer is to preside at the trial or hearing, but not later than the commencement of the trial or hearing.
>
> No such notice may be filed by a party or party's attorney against a judge or judicial officer who has presided at a motion or any other proceeding of which the party had notice. A judge or judicial officer who has presided at a motion or other proceeding may not be removed except upon an affirmative showing of prejudice on the part of the judge or judicial officer.

There are sound policy reasons to support the requirement that a Notice to Remove be timely filed. While the issue has not been directly addressed by Minnesota courts The Supreme Court of Georgia stated the significance of the timeliness requirement in Hunnicutt v. Hunnicutt, 283 S.E.2d 891 (Ga. 1981) citing State v. Fleming, 267 S.E.2d 207 (Ga. 1980):

> The written motion and affidavit should . . . satisfy at least two time requirements: It should (1) show that it was filed promptly and without delay, at the first opportunity after the affiant learned of the grounds for disqualification, and (2) it should be filed sufficiently in advance of trial so as to allow time for the designation of another judge to preside at trial if the presiding judge is found to be disqualified, so as not to delay trial. Id. at 893.

The Plaintiff's Notice to Remove is clearly untimely. The Minnesota Supreme Court determined that the mandatory removal-automatic reassignment provision of Rule 63.03 is not invoked by the filing of an affidavit of prejudice following remand.

In McClelland v. Pierce, 376 N.W.2d 217, appeal after remand 393 N.W.2d 224, review denied (Minn. 1985), the petitioner husband's affidavits of prejudice pursuant to Rule 63.03, filed subsequent to remand for reconsideration of the duration of maintenance and support orders in two dissolution proceedings, were untimely where proceedings following remand were a continuation of the original proceedings. Id.

In the instant case, both parties have been in litigation for several years before Judge Montgomery. After remand from the court of appeals last fall they appeared at the pre-trial/settlement conference in front of Judge Montgomery on October 9, 1992. Subsequent to that meeting, Judge Montgomery set a trial date of June 14, 1993. The Notice to Remove was not filed with the court until April 23, 1993, far in excess of ten days upon discovering Judge Montgomery would be presiding over the case. Furthermore, the Notice to Remove was filed on the eve of a Summary Judgment motion which might suggest its overriding purpose was delay rather than an attack on any purported bias.

No construction of the statutory right to a Notice of Removal can make the College's attempt to file as of right timely. Thus, the issue becomes whether there has been 'an affirmative showing of prejudice on the part of the judge or judicial officer.

In deciding the issue of a showing of prejudice it is necessary to consider the context in which the recusal motion arises. The United States Court of Appeals, District of Columbia addressed this issue in United States v. Haldeman, 559 F.2d, 31 (1976) where the court stated:

> The appearance of impropriety standard in terms summons a disqualification, not merely when the judge's impartiality might somehow be questioned, but only when it may reasonably be questioned. We think reasonableness of the challenge must take due account of the effect which its acceptance will have on the judicial process. So drastic would be the impact that we are unwilling to ascribe to ethical and legislative formulators of that standard a purpose to direct it toward judicial rulings on questions of law. Id. at 133 n.297.

The weight of authority on the subject holds if a motion to recuse includes allegations which the judge knows are false or erroneous, the judge should recuse herself only if the motion raises reasonable issues of impartiality, not merely because the litigant or counsel makes the allegations and therefore believes in their reasonableness. "A judge must actually be biased [or] actually have a financial interest for impartiality to be reasonably questioned." Harris v. Hornbaker, 658 P.2d 1219, 1228 (Wash. 1983) (Utter, J., concurring).

There are numerous cases where the judge's refusal to recuse himself or herself were affirmed on far greater showings of prejudice or bias than are alleged here. In State v. Pierson, 368 N.W.2d 427 (Minn. App. 1985), appellant argued that the trial court's denial of various motions for removal for implied and actual bias denied him his constitutional due process right to an impartial judge. Pierson 368 N.W.2d at 427. Appellant claimed the court was biased in stating in plea discussions that if the allegation in the complaint resulted in a conviction, an upward departure might be appropriate. Appellant further claimed the court acted in a bias fashion in taking testimony in chambers from the victim about her age in order to make an upward departure. Id. at 429.

The Minnesota Court of Appeals determined that the actions taken by the trial court judge were not prejudicial. The Court noted that although the trial court had made a statement about the appropriateness of an upward departure, it had also indicated it was aware of appellant's presumption of innocence prior to conviction and would wait for the standard report accompanying a presentence investigation before making up his mind on the sentence.

In State v. Yeager, 339 N.W.2d 648, 652 (Minn. App. 1987), the defendant sought to disqualify the trial judge on the basis of bias, charging that the judge had made derogatory statements concerning him in another proceeding, heard statements in another action to the effect he burned his house, and that the judge had sentenced him in connection with a welfare fraud conviction. The court found no bias, stating that the fact that a judge is familiar with a defendant is not an affirmative showing of prejudice. Id.

In State v. Kramer, 441 N.W.2d 502, (Minn. App. 1989), defendant Kramer sought to have the trial judge removed because the judge had earlier found Kramer's public defender in contempt. The court determine that a judge's prior adverse ruling in a case is not sufficient to show prejudice which would disqualify the judge. Kramer, 441 N.W.2d at 505 citing Olson v. Olson, 392 N.W.2d 338, 341 (Minn. Ct. App. 1986).

In United States v. Davis, 785 F.2d 610 (8th Cir. 1986), appellant argued his right to due process and fair trial were denied by prejudicial comments made by the district court consisting of the trial judge stating, in chambers, that he believed Davis was trying to prevent the trial through a technicality and the judge stating in denying a motion for judgment of acquittal that "there is substantial evidence in this case to indicate the guilt of the defendant beyond a reasonable doubt, and . . . that it is a case that the record requires and establishes that it should be presented to a jury." Davis, 785 F.2d at 617. The Eighth Circuit determined the court's

statements were not prejudicial, stating that the statement denying the motion for acquittal was merely a comment on the sufficiency of the evidence. The court further reasoned that none of the comments were made in the presence of the jury, thus did not constitute sufficient prejudice to have directed recusal. Id.

This court is concerned with both actual bias and the appearance of bias, however, the cases indicate in order to demonstrate sufficient cause to infer the inadequacy of the trial judge to impartially govern over the proceedings, actions revealing great bias or the appearance of such bias must so permeate the proceedings as to indicate a denial of due process. See Reserve Mining Co. v. Lord, 529 F.2d 181, (8th Cir. 1986), ("Record indicates overt acts by the district judge reflecting great bias against Reserve Mining company and substantial disregard for the mandate of this court . . . Judge Lord seems to have shed the robe of the judge and to have assumed the mantle of the advocate").

When the procedural posture of this case is considered as a whole it is evident that there has not been a sufficient affirmative showing of prejudice on behalf of the court to either of the parties in this action. Parenthetically, the court finds it curious that the plaintiff would believe the fact the judge's brother-in-law, who may testify on their behalf would somehow create a bias in favor of the defendant.

This court find that no prejudice could result to the College or the other parties involved from Judge Montgomery presiding over this case. She is an effective and capable jurist. Regardless of the ultimate disposition, the parties can be assured that Judge Montgomery will be scrupulously fair to all.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No. 89-9790

Golden Valley Lutheran College
and Lutheran Bible Institute
of Minneapolis,

Plaintiffs,

vs. **ORDER**

City of Golden Valley,
Minnesota Higher Education
Facilities Authority, and
Norwest Bank Minneapolis, N.A.,

Defendants.

The above-entitled matter came on for hearing on before the Honorable Ann Montgomery, Judge of the above-named Court, on the motion of Defendant City of Golden Valley for summary judgment. This motion was heard on April 27, 1993 and final submissions were made on May 12, 1993. Paul A. Sortland, Esq., appeared on behalf of Plaintiffs. Timothy D. Kelly, Esq., and Andrew M. Silverstein, Esq., appeared on behalf of Defendant City of Golden Valley. Defendants Minnesota Higher Education Facilities Authority and Norwest Bank Minneapolis, N.A., have been dismissed from the case and did not appear.

The Court, having considered all the arguments, files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. Defendant's motion for summary judgment on Plaintiffs' taking claim is GRANTED.

2. Defendant's motion for summary judgment on Plaintiffs' claim of tortious interference with prospective business advantage is GRANTED.

BY THE COURT:

S/S

Ann D. Montgomery
Judge of District Court

Dated: this 7th day
of June, 1993

MEMORANDUM

Plaintiffs in this action, Golden Valley Lutheran College and Lutheran Bible Institute of Minneapolis (collectively referred to as the "College") owned and operated a two-year junior college on a thirty-one acre campus near the intersection of Highway 55 and Douglas Drive (the "property" or the "campus") in the defendant City of Golden Valley, Minnesota (the "City"). The College was opened in 1961. In 1982, the College and the City entered a Planned Unit Development ("PUD") contract which approved the construction of additional buildings on the property and also approved then-existing uses which did not meet the applicable zoning requirements. (Grimes Aff. ¶ 11.) The PUD designated the permitted use of the property and buildings as "college campus." (Sortland Aff. Ex. A.)

The College ceased operation in May 1985 with several million dollars of secured and unsecured debt. (Silverstein Aff. Ex. 9, H. Sortland Dep., and Ex. 15.) Norwest Bank began foreclosure proceedings against the campus in 1986. (Norwest Bank Minneapolis, N.A. v. Minnesota Higher Educ. Facilities Auth., Hennepin County Dist. Ct. File Nos. 86-7537 and 86-7538.) The parties in the foreclosure actions entered into a Stipulation that agreed to summary judgment for foreclosure and provided that the College could continue to try to sell the property on its own until April of 1987. (Stipulation ¶ 3, attached to Sonneman Aff. filed on June 27, 1990 in support of the motion of the Minnesota Higher Education Facilities Authority for summary judgment in this matter.) The Stipulation further provided that any purchase agreement to sell the property entered into by the College was subject to confirmation by the foreclosure court. (Stipulation ¶ 6.)

On April 13, 1987, an organization of mostly Golden Valley residents called Global Ministry Village ("GMV")

entered a purchase agreement with the College to purchase one-half of the campus for $3.147 million. (Poppleton Dep. at 44-46.) At about the same time the College entered into another purchase agreement for $3 million with Derrick Companies ("Derrick") for the other one-half of the property. Within the month, GMV and Derrick had entered a joint planning agreement in order to develop the entire property as a single planned unit development which, it was believed, would be the development approach that the City would support. (Id. at 53-55.) GMV and Derrick then prepared preliminary plans to convert the College property into a mixed-use development comprising apartments and commercial facilities. (Derrick Dep. at 205-06.) GMV and Derrick had various meetings and conversations in 1987 with City staff, especially the City Manager William Joynes, and with City Council members to discuss the status of their development proposals.

At the urging of the City, Derrick sought the participation of a national developer and began negotiating with Lincoln Property Company ("Lincoln") to purchase and develop the property. In response to City concerns that dealing with GMV raised church-state issues, GMV assigned its rights under its purchase agreement with the College to Derrick. (Silverstein Aff. Ex. 16.)

In 1986, the City of Golden Valley and its neighbor to the south, St. Louis Park, jointly commissioned a traffic study by Strgar-Roscoe-Fausch, Inc. ("SRF") regarding the traffic impact of the soon-to-be-constructed Interstate 394 which now runs along the north-south border of the two cities. (Grimes Aff. ¶ 20.) This five-year construction project converted the low-speed arterial Highway 12 into an interstate freeway with more limited access. (Id. ¶¶ 18-19.) The purpose of the study was to evaluate the amount of traffic that the two cities could expect to have on local streets due to the construction of I-394 and the likely increase in development in

the area because of the new interstate. (Id. ¶¶ 19-21; Zimmer Dep. at 11-12, attached to Second Supplemental Silverstein Aff. as Ex. 1.) The borders of the study area were Highway 55 in Golden Valley on the north, Highway 100 on the east, the Burlington-Northern Railroad in St. Louis Park on the south, and Highway 169 (old Highway 18) on the west. (Zimmer Dep. Ex. 1.)

The results of the traffic study were presented to the two cities in August, 1987. In December 1987, the cities announced that they were considering a one-year moratorium on building within the study area in order to plan joint action to address the traffic and environmental problems anticipated to result from the construction of I-394. (Silverstein Aff. Ex. 14.) A public hearing on the moratorium was held during a January, 1988 Golden Valley City Council meeting at which several people stated that they believed the College property should be excluded from the moratorium, including representatives of GMV, Derrick, Lincoln and the College. (Id. Ex. 5.) The City Council voted not to amend the moratorium ordinance to exclude the College. (Id.)

The City enacted Interim Ordinance No. 707 on March 15, 1988 which imposed a six-month moratorium, later extended to one year, on building permits and applications for changes in zoning or other land use approvals. (Grimes Aff. Ex. C.) The Interim ordinance contained certain exceptions to the moratorium, such as allowing development where preliminary plan approval had already been granted by the City Council, but these exceptions did not apply to the College property. (Id.) St. Louis Park enacted a similar interim ordinance. (Hagen Aff. Ex. A.) During the moratorium, SRF continued to work with the two cities to provide technical support in the planning of an "overlay zoning ordinance" which would address traffic management plans for new developments near I-394. (Zimmer Dep. at 9-10.) Overlay Zoning Ordinances for the I-394 area were enacted by both

cities in February and March of 1989. (Supplemental Grimes Aff. Exs. F, G.) The geographic scope of the Overlay Ordinances is narrower than that of the Interim Moratorium Ordinances and does not include the College property. (Id.)

In October of 1987, Norwest Bank moved in the foreclosure proceedings to deny confirmation of the proposed sales to Derrick and GMV. The hearing on that matter was held in April, 1988, and on May 5, 1988, the court terminated the agreements and authorized sale by Norwest Bank. (Norwest Bank Minneapolis, N.A. v. Minnesota Higher Educ. Facilities Auth., Hennepin County Dist. Ct. File Nos. 86-7537 and 86-7538, Order of May 5, 1988.) The property was ultimately leased and then sold to the State of Minnesota for use as a School for the Arts.

The City has moved for summary judgment on the two claims remaining in this case. The College's first claim is that the moratorium resulted in a taking of its property without just compensation in contravention of the Fifth and Fourteenth Amendments to the United States Constitution and in contravention of Article 1, Section 13 of the Minnesota Constitution. The second claim asserted by the College is that the alleged wrongful and intentional conduct of City staff to discourage and drive away potential developers constituted tortious interference with the College's prospective business advantage. The College argues that summary judgment is inappropriate on either claim because of the existence of material factual disputes.

Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, if any, show that there is no issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. A fact is material if it would affect the

result or outcome of the case. Zappa v. Fahey, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976). In order to successfully oppose a motion for summary judgment, a party must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial. Minn. R. Civ. P. 56.05; Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). If there is any doubt as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of a finding that a fact issue exists. Harvet v. Unity Medical Ctr., Inc., 428 N.W.2d 574, 578 (Minn. Ct. App. 1988). However, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case. Davis v. Midwest Discount Sec., Inc., 439 N.W.2d 383, 386 (Minn. Ct. App. 1989) (citations omitted).

The Taking Claim

The United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The Minnesota Constitution requires compensation when private property is "taken, destroyed or damaged for public use." Minn. Const. art. I, § 13. The classic manner in which property is taken is when the government institutes eminent domain proceedings in order to acquire ownership of private property. Even when the government does not seek to acquire title to property, its actions can affect private property interests. Regulations of property use, though they may not result in any physical invasion or appropriation, may yet interfere with the value or use of private property to such an extent that they amount to a "taking" in the constitutional sense. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The U.S. Supreme Court

and the Minnesota courts have developed different standards for evaluating claims of regulatory taking.

The U.S. Supreme Court has not articulated a precise rule for determining when property has been taken in violation of the Fifth and Fourteenth Amendments; rather, it engages in ad hoc factual inquiries and case-specific weighing of competing public and private interests. Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980) (citations omitted); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Significant factors in this inquiry are the economic impact of the regulation -- particularly the extent to which the regulation has interfered with distinct investment-backed expectations -- and the character of the governmental action. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (citing Penn Central, 438 U.S. at 124).

The Court has recognized certain categories of takings, however, in which the balancing of public and private interests can be short-circuited because of the predominance of a particular factor. The first is when the regulation compels a property owner to suffer a permanent physical "invasion" of his or her property. Lucas v. South Carolina Coastal Council, __ U.S. __, 112 S. Ct. 2886, 2893 (1992). "In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." Loretto, 458 U.S. at 426. A second situation in which the Court has found a categorical taking is where "regulation denies all economically beneficial or productive use of land." Lucas, 112 S. Ct. at 2893. Finally, the private interests of the claimant need not be examined when land-use regulation "'does not substantially advance legitimate state interests.'" Id. (citing Agins, 447 U.S. at 260).

Rather than apply a general balancing approach, Minnesota courts have developed two discrete tests for when regulatory activity has resulted in a taking of property subject

to the regulation. If the purpose of the regulation involves government "arbitration" between competing land uses, "[t]he standard employed is whether a derivation of all reasonable use has resulted." Thompson v. City of Red Wing, 455 N.W.2d 512, 517 (Minn. Ct. App. 1990)(citing McShane v. City of Faribault, 292 N.W.2d 253, 257-58 (Minn. 1980)(emphasis added). If other reasonable uses of the property than the one frustrated by the regulation remain possible, including the landowner's current use, there is no taking. Thompson, 455 N.W.2d at 517-18. Where land use regulations are designed to benefit a "specific public or governmental enterprise," however, "there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations." McShane, 292 N.W.2d at 258-59 (emphasis added) (restrictions on commercial use, structure height and population density underneath flight approach paths to municipal airport were regulations to benefit governmental enterprise).

The College does not argue that the moratorium was enacted to benefit a governmental enterprise. Thus, the College can only prove a taking under the Minnesota Constitution if it can show that it was denied all reasonable uses of its property. Thompson, 455 N.W.2d at 517. Such a showing would also prove a taking under the U.S. Constitution. Lucas, 112 S. Ct. at 2893. However, as the U.S. Supreme Court recently clarified in Lucas, a regulation which denies a landowner something less than "all economically beneficial use" may nevertheless constitute a taking under the balancing test enunciated in Penn Central. Lucas, 112 S. Ct. at 2895 n.8; see also Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 263 (Minn. Ct. App. 1992).

Whether a taking has occurred is a matter of law that the court must decide, but disputed underlying facts are to be

determined by the jury or the court sitting as the trier of fact. Alevizos v. Metropolitan Airports Comm'n, 317 N.W.2d 352, 359-60 (Minn. 1982); Fitger Brewing Co. v. State, 416 N.W.2d 200, 207 n.2 (Minn. Ct. App. 1987). The burden of proof upon one alleging a taking is a heavy one. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493 (1987).

The College alleges that the moratorium resulted in a taking of its property under both the "categorical" taking rules and under the Penn Central balancing test. The College's arguments on its taking claim fail, even when all disputed factual allegations and doubts are resolved in its favor.

The College first alleges that the moratorium deprived it of all economic use of the property because it made it impossible to sell, lease or develop the campus for any "reasonable or profitable purpose." The moratorium prohibited any changes in the College's PUD zoning agreement with the City for one year. The College had been closed and insolvent for over two years and could not afford to operate a school on the site. All of the prospective purchasers and developers with whom the College had contact would have needed to obtain City approval for a change in the PUD. Further, at the time the moratorium was enacted, it was important that a sale of the property be completed before the College lost all financial interest in the property through foreclosure.

The College's claim that the moratorium deprived it of all economic use of the property is untenable. The Interim Ordinance did not affect existing approved uses of property within the moratorium boundaries. Thus, the College property could have been operated as a school, but for the College's own financial difficulties. Further, the Interim Ordinance did not prohibit the sale or lease of any property. The College site could have been sold, although changes in allowed uses could not have been approved until 1989.

When the Supreme Court confirmed that a regulation which denied all economically productive use of land was a categorical taking in Lucas, it anticipated that such takings would be "relatively rare." 112 S. Ct. at 2894. In Lucas a denial of all economically beneficial use resulted when the landowner was required to leave his land "substantially in its natural state" - a result which the Court felt to be typical of regulations that would fail as categorical takings of all use. Id. at 2894-95. The restrictions imposed on the College by the City's moratorium did not deprive the College of all economically beneficial use of the property. The College's financial inability to engage in the allowed use or to secure buyers for the property does not change the fact that some use was possible under the City's ordinance.[1]

The College also argues that the inclusion of the campus property within the moratorium area (as opposed to the enactment of the moratorium itself) constituted a categorical taking because it was not "reasonably necessary to the effectuation of a substantial public purpose." (Pls.' Mem. in Opp'n to Summ. J. at 22.) The College bases this argument on the following facts. First, the College property was on the northern boundary of the traffic study area, which ended at Highway 55. The College asserts that its property was the only one included in the study area that was planning development at the time the moratorium was enacted. In contrast, several commercial properties were being developed north of Highway 55; the College alleges that these

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[1] The College's allegation that potential buyers were discouraged and driven away by the City is not relevant to its taking claim; rather, it is properly considered in conjunction with its tort claim. There is no evidence that the City Council intended to interfere with the College's efforts to sell the property when it enacted the moratorium. The genuineness of the College's allegations to this effect is questionable in light of the fact that the moratorium was the product of a long-term, joint study and planning project by Golden Valley and St. Louis Park.

developments were likely to have a much greater impact on area traffic than the potential development on its site. Further, the College alleges that the traffic study conducted by SRF inflated the effect the proposed development of the campus would have on traffic feeding into I-394 and alleges that an accurate study would have shown that it was unnecessary to include the campus in the moratorium area. The College initially alleged that nothing was accomplished as a result of the moratorium except to foil its attempts to develop its property. In response to the City's assertion that the moratorium period was used to develop the I-394 Overlay Ordinance, the College points out that the Overlay Ordinance does not affect the College property.

The College's hindsight evaluation of the need to include its property in the moratorium area is not persuasive. The Interim Ordinance that imposed the moratorium was designed to, and did, serve a legitimate state interest. The U.S. Supreme Court has stated that a "broad range of governmental purposes and regulations," including various types of zoning ordinances, satisfy the "legitimate state interest" requirement. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-35 (1987); see also Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 591 (Minn. Ct. App. 1988). A Fifth Circuit decision, Schafer v. City of New Orleans, 743 F.2d 1086 (5th Cir. 1984), in which a building moratorium on fast-food restaurants was challenged on substantive due process grounds, is instructive with respect to the important public purpose served by development moratoria.

> Interim development controls such as this moratorium have been found to play an important role in municipal planning. They aid in "bridging the gap between planning and its implementation into legal measures." They may, as here, be used to preserve the status quo while study of

> the area and its needs is completed. This moratorium on land use serves a significant public purpose.
>
> Study of, and, if study warrants, changes in land use control cannot be completed instanter. While these are proceeding, there may be a dramatic increase in the number of potentially adverse uses . . . . Interim zoning or a moratorium may be necessary to prevent a plan's defeat before it is formulated.

Id. at 1090 (footnotes omitted).

The purpose statement of the Interim Ordinance presents concerns identical to those discussed in the Schafer decision.

> The Council has established a Task Force to analyze the impact of [traffic and development changes resulting from the upgrading of Highway 12 to I-394] on the surrounding area, review existing zoning and Comprehensive Plan designations for the area, and make recommendations for joint action with the City of St. Louis Park to address these problems. While this process and study is continuing, development in the affected area must be restricted to protect this planning process and to assure that development does not occur prematurely and in conflict with plans produced by this process.

(Grimes Aff. Ex. C, Interim Ordinance No. 707 § 1.01.) The moratorium created by this Ordinance substantially advanced the City's legitimate interest in developing traffic management plans.

Whether it was "necessary" to include the College property in the moratorium area and whether that inclusion "substantially advanced" the City's legitimate interests is not a conclusion that can be based on a hindsight evaluation of the

results of the moratorium planning activity. Development moratoria are imposed because what is "necessary" is unknown and in need of study. It is important that the provisions of a moratorium be broad enough to prevent potentially detrimental development. The fact that the subsequent zoning changes may not affect the entire area of the moratorium, as is the case with the City's Overlay Ordinance, is not indicative of the wisdom of the original decision with respect to the scope of the moratorium.

The City Council's decision to include the entire traffic study area in the moratorium was reasonable. The study area was based on the traffic consultant's experience in evaluating traffic activity relating to particular routes. (Zimmer Dep. at 38.) The inclusion of the College property in particular was justified by the fact that increased traffic generation was anticipated should the property be redeveloped and because of its proximity to I-394. (Id. at 32-33.) The exclusion of property to the north of Highway 55 was also justified by the recommendation of the traffic consultant. (Id.) The City's decision to extend the scope of the moratorium area to the boundaries of the traffic study area was logical and well-suited to the purposes of the Interim Ordinance.

Finally, even if the traffic impact of the development plans being made by GMV and Derrick at the time of the traffic study was inflated, the very fact that any increase in traffic could result from development of the College site justified its inclusion in the moratorium. The College has not shown that the inclusion of the College property in the moratorium area failed to substantially advance a legitimate state interest.

The College's final basis for alleging a compensable taking is based on the three-factor inquiry established in Penn Central. The "character of the action" factor invokes similar considerations as the requirement that the regulation advance a legitimate state interest. In fact, the College's arguments that the character of the moratorium did not justify its economic

effect on the property are identical to the arguments it made for its categorical taking challenge. As discussed above, the Interim Ordinance served the legitimate and important goal of planning and control of increased development and traffic congestion in the I-394 area.

The U.S. Supreme Court has regularly rebuffed taking challenges to land-use regulations that promoted the health, safety and general welfare of the community, even where those regulations caused substantial economic loss to a particular landowner. Penn Central, 438 U.S. at 124-27. The moratorium in this case imposed a temporary burden on landowners within its scope in order to obtain long-term benefits for the entire community and, perhaps, most especially those landowners within the moratorium area, as they would be most directly affected by I-394 and its effects on local traffic and development. When the challenged regulation is one which "adjust[s] the benefits and burdens of economic life to promote the common good," its character mitigates against finding that a taking has occurred.

See id. at 124.

The College argues that the moratorium interfered with "distinct investment-backed expectations" because it made it impossible to change the PUD or zoning of the property during the moratorium period, which discouraged potential buyers and frustrated the College's plan to sell the property for the $6 million it anticipated. Because the College was no longer able to operate the property as a school, and because it had found no buyer who was interested in using the property in that manner, the College argues that the existing PUD was no longer in conformity with its "primary expectation" for use of the campus property. The College appears to claim a "distinct investment-backed expectation" in being able to obtain a zoning change for the site.

The U.S. Supreme Court and the Minnesota courts have recognized that a property owner's expectations with respect to the permitted uses of that property must take into account the existence of government regulations. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226-27 (1986); Parranto Bros., 425 N.W.2d at 592. In Parranto Bros., the court concluded that the extensiveness of government regulation of land use diminished the plaintiff's investment-backed expectations in maintaining the existing zoning and concluded that a change in the applicable zoning did not constitute a compensable taking. 425 N.W.2d at 592. Similarly, the College's expectations regarding development of the property were subject to the terms of the existing PUD and the possibility that the City would not approve requested PUD or zoning changes.[2] It is also important to note that the moratorium on zoning changes was temporary and did not preclude either the College or a buyer of the property from seeking a PUD change at the year's end.

The College's expectation that it could sell the property for $6 million was based on a 1985 appraisal by a real estate consultant. (Sortland Aff. Ex. D.) The College did not "invest" in the property based on this appraisal; the appraisal was made after the College had ceased operating due to insolvency. The investment that the College points to is money from church members and secured loans obtained for the purpose of building the college and operating it as a school. No investments were made by the College based on the GMV, Derrick or Lincoln purchase proposals.

The expectation that one can sell property to recoup the investment that had been made in it is a general principle of real estate investment. It is not a "distinct investment-backed

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[2] Neither the College nor any potential buyers of the property formally requested a change in the existing PUD before the moratorium became effective.

expectation," the frustration of which constitutes a taking, to hope that almost thirty years after the College opened it will receive a particular resale price should it cease operating as a school. Given the vagaries of the real estate market and the specialized development already on the property, it was not reasonable to expect a sale at a particular price during a particular time period.

With respect to the final Penn Central factor, the College claims that the economic impact of the moratorium was severe because the College was unable to sell the property before it lost control of the property through foreclosure. Assuming that the moratorium affected the College's ability to sell the property, even though the moratorium did not actually prohibit its sale, case law does not support the contention that this result is a taking. When the Minnesota court evaluated a taking challenge to a two-year moratorium in Woodbury, it concluded that "[d]elaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings." 492 N.W.2d at 262 (citing Agins, 447 U.S. at 263 n.9) (emphasis added).

In a case quite similar to the instant one, a federal district court concluded that the loss of a lucrative sale due, in part, to a two-year development moratorium on the plaintiff's property was not a taking. Zilber v. Town of Moraga, 692 F. Supp. 1195 (N.D. Cal. 1988). In Zilber the plaintiff had entered an agreement with a developer in which the developer obtained an option to purchase the property for $1.7 million. Id. at 1197. The developer filed applications for preliminary development plan approval with the Town. Id. Subsequently, the Town enacted a moratorium on the processing and approval of such applications pending completion of an open space study, which halted consideration of the developer's

application. Id. Subsequently, the developer neither pursued its development plans nor exercised its purchase option. Id.

The Zilber court also cited Agins for the proposition that a delay in a landowner's ability to sell the property during the pendency of governmental decision-making is not a taking, and went on to conclude that the loss of a particular sale was "simply an 'incident of ownership'" and did not render the moratorium a taking as applied to the plaintiff. Id. at 1206-07. Likewise, the termination of the GMV and Derrick purchase agreements during the Golden Valley moratorium was not a taking of the College's property by the City but, rather, was an incident of its ownership of a parcel of property it wished to sell.[3]

The College argues, however, that its ability to sell and develop the property was not merely delayed for the period that the moratorium was in effect but was eliminated because the foreclosure proceedings intervened. If a delay in the sale or development of property during a moratorium is a mere incident of ownership, foreclosure resulting from proceedings begun before a moratorium is enacted is certainly less directly an effect of the government action. The College's financial condition since 1985 and its inability to avoid foreclosure sale of the property before the deadlines established in the foreclosure Stipulation are also "incidents" of its ownership of the property. Neither the foreclosure sale deadlines nor the timing of the I-394 construction were within the City's control or were a result of its actions.

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[3] Although Lincoln tendered a letter of intent to Derrick to purchase part of the College property on January 29, 1988, it was not accepted by Derrick. (Silverstein Aff. Ex. 1, Derrick Dep. at 230 and Ex. 13.) Thus, the allegation that the loss of Lincoln's interest in the College site is a taking is even weaker than the claims related to termination of the GMV and Derrick purchase agreements.

The College cannot sustain a claim of taking under the ad hoc balancing test established in Penn Central. The College's private interests in recouping its financial losses by selling the property were not unfairly circumscribed by the enactment of the moratorium in light of the important state interests served by the Interim Ordinance. Further, any effect the moratorium had on the College's property interests did not rise to the level of a compensable taking. Summary judgment is granted for the City on the College's taking claim.

The Tort Claim

The College has also asserted a claim of tortious interference with prospective business advantage. The elements of this tort were set forth in United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628 (Minn. 1982):

> one who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations, whether the interference consists of
> (a)inducing or otherwise causing a third person not to enter into or continue the prospective relation or
> (b)preventing the other from acquiring or continuing the prospective relation.

Id. at 632-33 (quoting the Restatement (Second) of Torts § 766B (1979)). The plaintiff has the burden of proving that the defendant "intentionally committed a wrongful act which improperly interfered with the prospective relationship." Hunt v. University of Minnesota, 465 N.W.2d 88, 95 (Minn. Ct. App. 1991). The plaintiff must also prove that, but for the interference, the plaintiff would have realized the prospective business advantage or expectancy. North Central Co. v.

Phelps Aero, Inc., 272 Minn. 413, 419-20, 139 N.W.2d 258, 263 (1965).

The College has identified three prospective relationships which it claims the City interfered with: the GMV and Derrick purchase agreements, treated collectively; Derrick's attempt to bring in Lincoln as a developer; and the efforts of Richard Anderson, a real estate broker acting 'on behalf of the College, to bring Dahlberg, Inc., to the site.[4] The College's tortious interference claims fail with respect to all three prospective relationships because it has failed to present specific admissible evidence that the alleged wrongful conduct of the City caused them to lose interest in the College property.

The alleged conduct of the City which is claimed to have interfered with the GMV and Derrick purchases can generally be described as a pattern of uncooperative and unreasonable responses to the GMV/Derrick development plans. The College claims it was unreasonable for the City staff to insist that they would deal with only one prospective purchaser for the entire site, that the project be discussed only with staff and not Council members, and that a "national" developer be involved in the project. The College also asserts that the church-state issue raised by the City regarding GMV's involvement in the project was a false concern. Roger Derrick alleges that the City Manager used Derrick's problems with another development in Golden Valley to try to intimidate him into withdrawing from the College project. (Sortland Aff. Ex.

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[4] The College also alleges that, prior to GMV and Derrick involvement in the project, "City officials routinely informed prospective developers that the asking price for the property was too high, and therefore diminished any interest of the developers in the property." (Pls.' Mem. in Opp'n to Summ. J. at 25-26.) This allegation does not merit serious consideration because it does not describe the prospective business relationships with sufficient specificity and no evidence of wrongful interference or causation with respect to these speculative relationships is presented.

G, Derrick Dep. at 73-74.) The GMV and Derrick representatives also stated that inaccurate and incomplete information regarding their proposals was provided to the City Council by City staff. Finally, the GMV and Derrick representatives believed that the City Manager's reluctance to endorse their development plans because "too many uses" were being proposed for the site was disingenuous.

Nothing the City did caused either GMV or Derrick to back out of their purchase agreements with the College; those agreements were terminated by the court after a foreclosure hearing. Although the College suggests that if the City had been more supportive and cooperative with the GMV/Derrick planners the purchase agreements would not have been terminated, there is no evidence before this Court as to why the court having responsibility for the foreclosure proceedings decided to terminate the agreements. The College has presented no specific evidence that, but for the City's response to the GMV/Derrick proposals, the purchase agreements would not have been terminated through foreclosure and would have resulted in a completed sale of the property.[5] The College's causation arguments are based only in speculation.

Similarly, there is no admissible evidence that Lincoln withdrew from negotiations with Derrick because of interference by the City. Lincoln had expressed strong interest in the College property as a possible Twin Cities location for an apartment development, although it indicated that it was also looking at other communities and conditioned its interest on zoning approval and tax increment financing. (Sortland Aff. Ex. I; Derrick Aff. ¶¶ 7-10.) A partner in Lincoln, Richard Myers, spoke in support of excluding the College

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[5] In addition to the requirement in the Foreclosure Stipulation that the purchase agreements be confirmed by the court, the Derrick purchase agreement contained conditions which would allow the buyer to terminate it if not met. (Derrick Dep. at 137-41.)

property from the moratorium at the public hearing. (Silverstein Aff. Ex. 5.) Lincoln had also signed a letter of intent to purchase part of the College property from Derrick, but Derrick did not accept the terms of the offer. (Id. Ex. 13; Derrick Dep. at 229-30.)

The College alleges that Lincoln lost interest in the property because of the moratorium and because the City told Lincoln it should consider developing on a different site if it wanted City cooperation. The only evidence the College submits to support this allegation is a statement by Roger Derrick that Richard Myers of Lincoln told him these were Lincoln's reasons for ending negotiations. (Derrick Aff. ¶ 13; Derrick Dep. at 6465.) This evidence is inadmissible hearsay and is insufficient to avoid summary judgment. Kletschka v. Abbott-Northwestern Hosp., 417 N.W.2d 752, 754 (Minn. Ct. App. 1988) ("In order to successfully oppose summary judgment, appellant must extract specific, admissible facts from the voluminous record and particularize them for the trial judge." Hearsay not admissible for this purpose.)

Furthermore, these allegations are completely negated by the Lincoln representatives with whom Derrick was negotiating. Richard Myers and James Goodson of Lincoln both state that the City did nothing to cause them to lose interest in the College property or suggest that they develop on another site in Golden Valley instead. (Myers Aff.; Goodson Aff.)

Finally, in post-hearing submissions on this motion, the College alleged for the first time that the City steered another prospective purchaser, Dahlberg, Inc., away from the College property and onto a site owned by the City. (Pls' Supplemental Letter dated May 12, 1993.) In his deposition, Richard Anderson, a real estate broker, testified that he had been negotiating a deal whereby a company called Hoyt Development would purchase part of the property and construct a new headquarters for Dahlberg, Inc., which would

then lease the site from Hoyt with an option to purchase. (Anderson Dep. at 48-49.) Anderson stated that Dahlberg would not agree to the proposal because the City preferred Dahlberg to relocate to a different site in Golden Valley and Dahlberg needed to satisfy the City because the City was going to buy the property on which Dahlberg was currently located. (Id. at 58-59.)

The only nonhearsay evidence to support Anderson's testimony is a statement from Mark Grimes, City Planner, to Anderson that the City wanted Dahlberg to locate on another site. (Id. at 59.) This statement does not prove either that the City "interfered" in any way in Dahlberg's dealings with Anderson or the College, or that the City caused Dahlberg to decide against locating on the College property. Once again, the College's allegation is negated by the party allegedly chased away from doing business with the College. Joan Utter, who evaluated the Hoyt proposal on behalf of Dahlberg, has stated that no one from the City communicated to her any preference for where Dahlberg should or should not relocate its headquarters. (Utter Aff.)

The College has failed to present specific, admissible evidence that the City's conduct caused GMV, Derrick, Lincoln or Dahlberg to lose either the interest or ability to purchase its property. With respect to the Lincoln and Dahlberg prospects, the College has also failed to provide evidence of wrongful interference by the City. For these reasons, summary judgment is granted for the City on the College's tort claims.[6]

ADM

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[6] Because the College has not proven the elements of tortious interference, it is unnecessary to reach the issue of the City's immunity from such claims.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No. 89-9790

Golden Valley Lutheran College
and Lutheran Bible Institute
of Minneapolis,

Plaintiffs,

vs.

AMENDED
ORDER

City of Golden Valley,
Minnesota Higher Education
Facilities Authority, and
Norwest Bank Minneapolis, N.A.,

Defendants.

The above-entitled matter came on for hearing on before the Honorable Ann Montgomery, Judge of the above-named Court, on the motion of Defendant City of Golden Valley for summary judgment. This motion was heard on April 27, 1993 and final submissions were made on May 12, 1993. Paul A. Sortland, Esq., appeared on behalf of Plaintiffs. Timothy D. Kelly, Esq., and Andrew M. Silverstein, Esq., appeared on behalf of Defendant City of Golden Valley. Defendants Minnesota Higher Education Facilities Authority and Norwest Bank Minneapolis, N.A., have been dismissed from the case and did not appear.

The Court, having considered all the arguments, files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. Defendant's motion for summary judgment on Plaintiffs' taking claim is GRANTED.

2. Defendant's motion for summary judgment on Plaintiffs' claim of tortious interference with prospective business advantage is GRANTED.

NOTWITHSTANDING GEN. R. PRAC. 125, LET JUDGMENT BE ENTERED IMMEDIATELY.

BY THE COURT:

S/S
Ann D. Montgomery
Judge of District Court

Dated: this 9th day
of June, 1993

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Golden Valley Lutheran College, and Lutheran Bible Institute of Minneapolis

Plaintiffs

JUDGMENT

Date: June 16, 1993

vs

JUDGMENT ROLL

City of Golden Valley, Minnesota Higher Education Facilities Authority, and Norwest Bank Minneapolis, National Association

File No. 89-9790

Defendants

This cause having been regularly placed upon the calendar of the above named Court, came on for hearing on the 27th day of April, 1993, upon motion of Defendant for summary judgment, and the Court, after hearing the arguments of counsel and being advised in the premises, did, on the 9th day of June, 1993, duly make and file its order granting said notion and for judgment herein, and on the 9th day of June, 1993, the Court did make and file its amended order for judgment.

Now, pursuant to said amended order and on motion of Timothy D. Kelly, Esq., Attorney for the Defendant,

IT IS HEREBY ADJUDGED:

1. That the Defendant's motion for summary judgment on Plaintiffs' taking claim be, and hereby is GRANTED.

2. That the Defendant's motion for summary judgment on Plaintiffs' claim of tortious intereference with prospective business advantage be. and hereby is, GRANTED.

NOTHWITHSTANDING Gen.R. Prac. 125, Let Judgment be entered immediately.

BY THE COURT
DISTRICT COURT ADMINISTRATOR

BY Susan Duticco
DEPUTY

GOLDEN VALLEY LUTHERAN COLLEGE, et al.,
Appellants,

v.

CITY OF GOLDEN VALLEY, Respondent,
Minnesota Higher Education Facilities Authority, et al.,
Defendants.

No. CX-93-1852.
Court of Appeals of Minnesota.
Jan. 25, 1994.
Review Denied March 15, 1994.

Appeal from District Court, Hennepin County; Ann Montgomery, Judge.

Paul A. Sortland, Minneapolis, for appellants.

Timothy D. Kelly, Wendy A. Snyder, Celeste E. Culberth, Kelly & Berens, P.A., Minneapolis, for respondent.

Considered and decided by AMUNDSON, P.J., and PARKER and SCHUMACHER, JJ.

UNPUBLISHED OPINION

PARKER, Judge.

Appellants Golden Valley Lutheran College and Lutheran Bible Institute, former operators of a two-year college, challenge the district court's grant of summary judgment against their claims of unconstitutional taking of property and tortious interference with prospective business advantage. They also argue that the chief judge of the district erred in denying appellants' motion to remove the judge who granted summary judgment in this case. We affirm.

DECISION

On review of a district court's grant of summary judgment, this court determines whether there are any genuine issues of material fact or whether the lower court erred in applying the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn.1990).

1. Taking of Property

Appellants argue that the City of Golden Valley's imposition of a one-year development moratorium forced their property into foreclosure, amounting to an unconstitutional taking of property without just compensation. We disagree. There is no evidence of a taking by the city either under the "categorical takings" or the "Penn Central balancing" tests.

Whether a municipality has taken property unconstitutionally without just compensation is a question of law, which this court may review de novo. Thompson v. City of Red Wing, 455 N.W.2d 512, 516 (Minn.App.1990), pet. for rev. denied (Minn. June 26, 1990).

A. Categorical Taking

Under the categorical takings doctrine, a municipality must compensate landowners if a regulation deprives them of all economically beneficial use of their land. Lucas v. South Carolina Coastal Council, --- U.S. ----, ----, 112 S.Ct. 2886, 2893 (1992).

Appellants argue that the moratorium and the Planned Unit Development ("PUD") deprived them of all economically beneficial use of their land because (1) they and other possible

owners were restricted to using the land only for the Golden Valley Lutheran College both before and during the moratorium; (2) the PUD and the moratorium prevented the sale of the property to prospective buyers; and (3) the foreclosure court authorized sale of the property because of the moratorium.

Even assuming these assertions to be true, appellants still have not shown they were denied all economically beneficial use of their land. Although appellants themselves lacked the financial means to use the property as a college, they could have sold or rented it to others for use as a college. There is no evidence that the moratorium prevented the sale of the property to prospective buyers. Indeed, two prospective buyers had signed purchase agreements, which were not accepted by appellants.

In fact, there is no evidence in the record that the foreclosure court terminated appellants' purchase agreements with Derrick Companies and Global Ministry Village and authorized the foreclosure because of the moratorium. The college had been closed since 1985, and foreclosure had begun almost two years before the moratorium was imposed. Appellants have not shown any causal link between the foreclosure and the moratorium.

We note also that a temporary development moratorium has been found not to deny a landowner all economically beneficial use of land. See Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 261-62 (Minn.App.1992), pet. for rev. denied (Minn. Jan. 15, 1993), cert. denied, 113 S.Ct. 2929 (1993). Even if all economically beneficial use is denied during the moratorium, economic use exists at the end of the moratorium period. Id.

Accordingly, we affirm the district court's conclusion that the moratorium did not constitute a categorical taking of appellants' property.

B. Balancing Test

Appellants have also failed to present evidence of a taking considering the three-factors the Penn Central court enumerated. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978). Under this test, a landowner must show (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental regulation.

Appellants have presented no evidence of the economic impact of the moratorium on their property. Foreclosure had begun on the mortgage two years before the moratorium. There is no evidence in the record that the judge ordered foreclosure because of the moratorium.

Appellants also argue that the moratorium affected their ability to sell the property before the foreclosure, but have presented no evidence to support this assertion. As noted earlier, two developers were prepared to buy the property, but this fell through because the foreclosure court terminated their purchase agreements.

Accordingly, we affirm on this ground also.

2. Tortious Interference

We agree with the district court that there are no genuine issues of material fact as to whether the city tortiously interfered with three prospective business relationships:

Dahlberg, Inc; Lincoln Properties; and Global Ministry/Derrick Companies.

To prove an action for tortious interference with a prospective business relationship, a plaintiff must show that the defendant intentionally committed a wrongful act that improperly interfered with a prospective contractual relationship. Hunt v. University of Minnesota, 465 N.W.2d 88, 95 (Minn.App.1991). The plaintiff must also show that, but for the interference, the plaintiff would have realized the business advantage. North Central Co. v. Phelps Aero, Inc., 272 Minn. 413, 419-20, 139 N.W.2d 258, 263 (1965).

A. Dahlberg, Inc.

Appellants presented inadmissible hearsay testimony purporting to show that the city interfered with their attempts to sell the property to Dahlberg, Inc. There was, in the record, evidence that the city told a real estate broker that the city wanted Dahlberg to locate on city-owned property. This evidence, however, fails to show interference with business advantage and also fails to show that, but for the "interference," Dahlberg would have located on appellants' property.

B. Lincoln Properties

Appellants argue that the city tried to discourage Lincoln Properties from joining two other developers who were interested in developing the college property. The testimony of Roger Derrick, president of Derrick Companies, shows conclusively that Derrick Companies rejected Lincoln's offer. Thus, Derrick Companies' refusal, not the city's interference,

caused this deal to fall through. We affirm the summary judgment on this claim also.

C. Global Ministry/Derrick Companies

Appellants also argue that the city's interference caused the destruction of a deal with two developers interested in buying the college property. The record does not support this assertion.

The uncontroverted evidence shows that the deal fell through because the foreclosure court terminated the purchase agreements with the two developers and authorized a foreclosure sale. And, as noted earlier, there is no evidence that the foreclosure court terminated the agreements because of the development moratorium or other city action. Accordingly, we affirm the grant of summary judgment on this claim.

Because we have affirmed the grant of summary judgment on the tortious interference claims, there is no need to reach the official immunity issue.

3. Appellants argue that the chief judge of the district erred in failing to remove the judge hearing the summary judgment motion.

Rule 63.03 provides that a judge may be removed once, as of right, by motion made within ten days after a party receives notice of the judge assigned to a case. Minn.R.Civ.P. 63.03. The same rule also provides that a party may remove a judge upon a showing of prejudice. Parenthetically, Minn.R.Civ.P. 63.02 provides that no judge shall sit for a case if the judge would be excluded for bias from acting in the case as a juror. Appellants argue that bias should be presumed

because the judge's husband was the brother of a witness to be called in this case. Appellants conceded at oral argument, however, that her husband had died before the summary judgment motion was heard. Therefore, a removal motion could not rest on a family relationship that no longer existed.

The rules do not explicitly state a timeliness provision for removal of a judge for bias. We agree, however, with the chief judge of the district, who noted by memorandum that appellants' delay in bringing the motion to remove was inexcusable. Appellants waited more than one and one-half years after a previous appeal to this court to bring the motion to remove and served the motion the day before the summary judgment hearing. This delay suggests, as the chief judge noted, that the removal motion was brought to delay the trial or harass the city, rather than from a genuine concern for bias.

Finally, we address appellants' explanation for the delay, namely, that this court's previous opinion contained an implied directive to the assigned judge to remove herself. Our unpublished opinion contained no such directive, express or implied; had that been our intent, we would have stated so expressly and directly, as we did on the issue of disqualification of attorneys. See Golden Valley Lutheran College v. City of Golden Valley, No. CO-91-1189, unpub. op. at 9-10 (Minn.App. Dec. 17, 1991).

Accordingly, we affirm the chief judge's denial of appellants' motion to remove the assigned judge.

Affirmed.

STATE OF MINNESOTA

IN SUPREME COURT

CX-93-1852

Golden Valley Lutheran College, et al.,

Appellants,

vs.

City of Golden Valley,

Respondent,

Minnesota Higher Education Facilities Authority, et al.,

Defendants.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Golden Valley Lutheran College and Lutheran Bible Institute of Minneapolis for further review be, and the same is, denied.

Dated: March 15, 1994

BY THE COURT:

A. M. Keith

Office of Appellate Courts
Filed: March 15, 1994

INTERIM ORDINANCE NO. 707

AN ORDINANCE AMENDING THE CITY CODE AN INTERIM ORDINANCE ESTABLISHING DEVELOPMENT RESTRICTIONS ALONG STATE HIGHWAY 12/I-394

The City Council for the City of Golden Valley does hereby ordain as follows:

Section 1. The City Zoning Code is hereby amended by enacting and adding thereto Chapter 23 which shall read as follows:

Section 1. Purpose.

1.01 The United States and Minnesota Departments of Transportation are upgrading State Highway No. 12 to become Interstate Highway 394. This will drastically alter transportation patterns and foster new development and redevelopment along the highway corridor. It will also generate severe traffic congestion on both the freeway system and the local street network in the area resulting in traffic problems, pollution problems, and environmental problems. Because the I-394 corridor runs along the common border between the City and St. Louis Park, the two cities have commissioned a study of their shared problems and plan to work together to solve them. The Council has established a Task Force to analyze the impact of these changes on the surrounding area, review existing zoning and Comprehensive Plan designations for the area, and make recommendations for joint action with the City

of St. Louis Park to address these problems. While this process and study is continuing, development in the affected area must be restricted to protect this planning process and to assure that development does not occur prematurely and in conflict with plans produced by this process.

The City Council is aware of the hardship that a complete development prohibition would impose on landowners. The City and St. Louis Park plan to move as quickly as possible so that this ordinance may be terminated before its expiration date, if possible

In addition, certain exceptions to the development restrictions are appropriate. Landowners have the right to proceed with development-proposals already approved. Internal improvements in existing buildings would have little impact on the planning process because development of the site has already largely occurred and the external impact of the changes will be minimal. Low density residential development (up to four units per acre) need not be restricted because that is consistent with the largely residential nature of the City. Exhibit "C"

As protection for the planning process, however, no applications for amendments to the Comprehensive Plan, Planned Unit Developments or rezonings should be accepted or considered. These are the very issues being studied by the Task Force and should be

considered only after the study and recommendations are completed.

Section 2. Development Restrictions.

2.01 Pursuant to Minnesota Statutes Section 462.355, Subd. 4, no building permit shall be issued for any property located in the City of Golden Valley lying southerly of State Highway 55 except that part lying easterly of Highway 100 ("Study Area"), except the following:

a. Property designated as single family residential or two family residential (R-2) in the Zoning Code.

b. Property for which preliminary subdivision approval and/or site plan approval has been granted (but final approval has not been granted) prior to the effective date of this ordinance.

c. Interior improvements for existing structures which do not require additional parking under applicable ordinances, regulations, etc.

d. Exterior additions to existing structures which do not increase the size of the structure by more than 10% of its existing square footage nor require additional parking under applicable ordinances, regulations, etc.

e. Improvements necessary to correct violations of State law and City ordinance which

have created a threat to public health and safety, as determined by the City.

2.02 No applications for amendments to the Comprehensive Plan, rezonings or other land use related approvals affecting property in the Study Area shall be accepted or considered.

Section 3. Term

3.01 This ordinance shall be effective upon its publication and shall terminate 180 days thereafter. However, in the event that both the Cities of St. Louis Park and Golden Valley have not acted upon the recommendation of the Task Force, it shall be automatically extended for an additional 180 days by the following procedure: The City Managers of both Cities shall provide written notice of such lack of action to their respective Councils, and receipt of such notice shall be reflected in each City Council minutes.

Adopted by the City Council of the City of Golden Valley on this 15th day of March, 1988.

/s/Mary Anderson
Mary Anderson, Mayor

ATTEST:

/s/Shirley Nelson
City Clerk

Exhibit "C"

P. D. #34
City Council Approval 5-4-82

CITY OF GOLDEN VALLEY, MINNESOTA
USE PERMIT
FOR
PLANNED UNIT DEVELOPMENT

PROJECT NAME: Golden Valley Lutheran College

ADDRESS: 6125 Olson Memorial Highway

LEGAL DESCRIPTION:

Description of Building Parcel

That part of the east 301.87 feet of the west 546.57 feet of the northwest quarter of the southwest quarter of Section 33, Township 118 North, Range 21 west of the 5th principal meridian, lying north of the south 555.37 feet thereof and lying south of 6th Avenue North.

Description of Remaining Parcel

All that part of the northwest quarter of the southwest quarter of Section 33, Township 118 North, Range 21 west of the 5th principal meridian which lies south of 6th Avenue North, except railroad right-of-way and except that part of the east 301.87 feet of the west 546.57 feet of the above described property lying north of the south 555.37 feet thereof.

Description of Road Easements

The north 40 feet of the south 782.37 feet of the east 301.87 feet of the west 546.57 feet of the northwest quarter of the

southwest quarter. That part of the east 40 feet of the west 384.70 feet of the northwest quarter of the southwest quarter lying north of the south 782.37 feet thereof and south of the southerly line of State Highway 55. Also that part of the northwest quarter of the southwest quarter, described as follows: Beginning at a point 496.57 feet east of the west line and 782.37 feet north of the south line of said northwest quarter of the southwest quarter; thence east parallel with the south line of said northwest quarter of the southwest quarter a distance of 50 feet; thence north parallel with the west line of said northwest quarter of the southwest quarter a distance of 60 feet; thence southwesterly to the point of beginning. All in Section 33, Township 118, Range 21.

Description of Platted Areas

Lots 2 and 3, Block 3, Tralee except that part of said Lot 3 lying easterly of the following described line: Beginning at a point in the northerly line of said Tralee, 20.3 feet west of the northeast corner of said Lot 3; thence southeasterly on a course parallel to the easterly line of said Lot 3 and same extended to a point of intersection with the east line of said Lot 3.

Lots 8, 9, 10 and 11 in Block 3, Outlot 1; all in Westchester. Including all of a vacated Douglas Drive North shown on the plat of Westchester.

Exhibit "A"

APPLICANT: Golden Valley Lutheran College

ADDRESS: 6125 Olson Memorial Highway
Golden Valley, MN 55422

OWNER: Golden Valley Lutheran College

ADDRESS: 6125 Olson Memorial Highway
Golden Valley, MN 55422

ZONING DISTRICT: Institutional (1-2)

PERMITTED USES: Uses permitted in this development are college campus buildings including the following:

A. A two story classroom building comprising approximately 67,760 square feet of space with a one story cafeteria addition comprising 2,478 square feet of space.

B. Three two story dormitory buildings, two of which comprise approximately 12,170 square feet of space each, and the third of which comprises approximately 12,760 square feet of space.

C. Two three story dormitory buildings, one of which comprises approximately 48,240 square feet of space and the second of which comprises' 32,680 square feet of space.

D. A one and a half story commons building comprising 4,500 square feet of space.

COMPONENTS:

A. Land Use Component:

1. Land uses within P.U.D. #34 shall be limited to those uses indicated on the approved site plan, Campus Plan Proposed Construction Sheet No. GVLC 2R, dated April 14, 1982 and revised flay 10, 1982. The principal use shall be college campus buildings including a classroom building, five dormitory buildings and a commons building.

2. Parking for P.U.D. #34 shall consist of 346 parking spaces including 156 spaces in two parking lots in the northerly portion of the campus adjacent to Highway 55, 48 spaces along the east interior drive, 102 spaces in the east parking lot, and 40 spaces along the west interior drive, as shown on the approved site plan, Campus Plan Proposed Construction Sheet No. GVLC 2R, dated April 14, 1982 and revised May 10, 1982.

3. Landscaping as indicated on the approved site plan, Campus Plan Proposed Construction Sheet No. GVLC 2R, dated April 14, 1982 and revised May 10, 1982, and on the Landscape Plan, Landscaping Sheet No. C-3R, dated February 25, 1982 and revised May 10, 1982, shall be subject to approval of the Building Board of Review and the City Council. Landscaping as approved by the Building Board of Review and City Council shall be completed within 210 days following completion and occupancy of the proposed new dormitory and commons buildings. Landscaping adjacent to the proposed new cafeteria addition scheduled for a subsequent construction phase shall

conform to a Landscape Plan approved by the Building Board of Review and shall be completed within 210 days following completion and occupancy of the addition.

4. Special precautions shall be taken during and after construction to protect against erosion, silting, excessive grading, or any other conditions detrimental to the area. Grading and excavation for footings and other construction needs shall be done in a manner so as to avoid dirt storage, disturbing of trees, or other activities beyond the prescribed construction limits.

5. Any future expansion of Golden Valley Lutheran College shall include provision for student recreational needs.

B. Circulation Component:

1. Interior drives and walks shall be located where shown on the approved site plan, Campus Plan Proposed Construction Sheet No. GVLC 2R, dated April 14, 1982 and revised May 10, 1982.

2. Interior concrete curbs shall be constructed within the development to separate driving and parking surfaces from landscaped areas, with the exception of pre-existing driving and parking surfaces. However, interior curbs shall be constructed within the new stage of development. Interior curbs shall not be less than six (6) inches in height. Sidewalks and curbs shall be designed to accommodate the handicapped.

3. Radiuses on the walkway/emergency road shall be designed to accommodate City fire equipment without wheels going off the pavement on curves.

4. Signage shall be added at the west access road to reduce unwarranted traffic.

5. The southwest emergency access road from Edgewood Avenue North shall be vacated, the apron removed, and the apron and road replaced with evergreen trees and sod as indicated on the approved site plan, Campus Plan Proposed Construction Sheet No. GVLC 2R, dated April 14, 1982 and revised May 10, 1982.

C. Population Component:

1. Approximately 560 students will be housed in the five dormitories on the Golden Valley Lutheran College Campus with 400 students housed in the existing four dormitories and 160 students housed in the new dormitory building.

2. Total student enrollment at Golden Valley Lutheran College will be approximately 700 to 800 students.

D. Subdivision Component:

1. The described property shall be platted in accordance with the approved Preliminary Plat Sheet No. GVLC 1, dated April 12, 1982 and revised April 14, 1982, and the plat name shall include "P.U.D. No. 34".

2. The Final Plat shall be filed within six (6) months after the date of the Council action giving final approval to the PUD Permit.

E. Services and Facilities Component:

1. Water and sanitary sewer service lines shall be installed, owned and maintained by the owner or owners.

2. Existing watermain easement shall be vacated and new watermain easements dedicated prior to issuance of building permits for the new dormitory and commons buildings.

3. All utilities shall be underground.

4. Wet type standpipes shall be installed in the new dormitory building.

5. Sprinkler system shall be installed in all trash chutes and trash collection areas.

6. Fire alarm systems shall be approved by the City Fire Marshal prior to installation.

7. A Fire Department siamese shall be installed on the west side of the new dormitory as near as possible to the new fire hydrant.

8. All mechanicals on roof or ground shall be screened with inspection Department approval.

9. All waste generated by the occupancy shall be stored internally until removed from the premises.

F. Construction Order Component:

1. Construction of proposed additions to Golden Valley Lutheran College Campus facilities shall be completed in two phases with construction of the new dormitory and commons buildings to be completed in the first construction phase and construction of the cafeteria addition to take place in a later construction phase. All other site improvements, including drives, parking areas, walks and landscaping, shall be completed in conjunction with the first phase of construction.

2. A bond running in favor of the City of Golden Valley as obligee for an amount to be determined by the City Engineer shall be required for all bituminous surfacing and concrete sidewalk, curb and gutter as provided on the approved site plan, Campus Plan Proposed Construction Sheet No. GVLC 2R, dated April 14, 1982 and revised May 10, 1982.

3. A bond running in favor of the City of Golden Valley as obligee for an amount to be determined by the City Engineer shall be required for installation of sewer and water service as provided on the approved utilities plans, Utilities and Dimensions Sheet No C-2R, dated February 25, 1982 and revised April 28, 1982, and Waterline Plan and Profile Sheet No. C-4R, dated April 21, 1982 and revised April 28, 1982.

4. A deposit in an amount to be determined by the City Engineer shall be placed with the City of Golden

Valley to cover Engineering Inspection costs associated with proposed construction.

5. A landscape bond running in favor of the City of Golden Valley as obligee shall be posed in an amount to be determined by the Building Board of Review and shall run for two (2) full growing seasons and until released by the Golden Valley Inspection Department. The bond shall be executed and delivered to the Golden Valley Inspection Department prior to issuance of the building permit.

G. Maps and Reports:

1. The architect or engineer in charge of the project, who shall be registered in the State of Minnesota, shall provide as a minimum monthly written reports for each phase of the construction process.

2. The architect or engineer in charge of the project, who shall be registered in the State of Minnesota, shall inspect the site during construction. When the project is completed, the registered architect or engineer shall certify in writing to the Building Department of the City of Golden Valley that the project has been constructed in conformity with all approved plans applicable to the subject PUD.

It is hereby understood and agreed that this Use Permit is a part of the City Council approval granted on May 4, 1982 relative to Planned Unit Development #34.

GOLDEN VALLEY
LUTHERAN COLLEGE

WITNESS: Alda W. Peikert BY: Brent C. Opsal
TITLE: President
DATE: 18 May 1982

CITY OF GOLDEN VALLEY

WITNESS: S/S BY: S/S
Rosemary Thorsen, Its Mayor
WITNESS: S/S AND: S/S
Jeff Sweet, Its City Manager

DATE: 5-30-82

Supreme Court, U.S.
FILED
JUL 13 1994
OFFICE OF THE CLERK

No. 93-1997

In the
Supreme Court of the United States
October Term, 1993

GOLDEN VALLEY
LUTHERAN COLLEGE, and
LUTHERAN BIBLE INSTITUTE
OF MINNEAPOLIS,

Petitioners,

v.

CITY OF GOLDEN VALLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. Whether summary judgment dismissing Petitioners' claim of a categorical taking of property was proper where Petitioners failed to produce evidence that a temporary municipal building moratorium denied Petitioners all beneficial use of their property.

B. Whether summary judgment dismissing Petitioners' claim of a taking of property was proper where there is no evidence that Respondent's actions had any negative economic impact whatsoever on Petitioners.

C. Whether Petitioners' motion to remove the trial judge because her former brother-in-law was a witness raises any colorable federal issue.

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CITY OF GOLDEN VALLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent City of Golden Valley (the "City") hereby files this Response to the Petition of Golden Valley Lutheran College and Lutheran Bible Institute of Minneapolis (jointly, the "College") for a Writ of Certiorari to review the March 15, 1994 decision of the Minnesota Supreme Court not to review the January 25, 1994 decision of the Minnesota Court of Appeals affirming the trial court's summary judgment in favor of the City.

CONSTITUTIONAL PROVISIONS

The only constitutional provision involved in this appeal is the Fifth Amendment to the United States Constitution, which provides that private property shall not "be taken for public use, without just compensation."

COUNTERSTATEMENT OF THE CASE

The City adopts the statement of facts contained in the trial court's June 7, 1993 Memorandum. *See* Petition for Writ of Certiorari (the "Petition"), pp. F3-F6. The trial court's judgment was affirmed in a January 25, 1994 Minnesota Court of Appeals decision. The Minnesota Supreme Court denied discretionary review of the Minnesota Court of Appeals decision on March 15, 1994.

SUMMARY OF THE ARGUMENT

The College's Petition for a Writ of Certiorari to the Minnesota Supreme Court should be denied. The College failed to support its "taking" claim with evidence that the temporary building moratorium enacted by the City deprived the College of all beneficial use of its property, nor did it introduce any evidence that the moratorium had a negative economic impact on the College. Finally, its attempt to remove the trial judge does not raise any federal issue and was transparently dilatory, given that the College had participated in discovery before the same judge for 16 months before bringing its untimely motion.

REASONS THE WRIT SHOULD BE DENIED

A. *There Is No Evidence Of A Categorical "Taking."*

The Minnesota Court of Appeals correctly found that the College presented no evidence of a taking by the City under either of two "taking" standards. In order to avoid summary judgment under the "categorical takings" doctrine, the College must come forward with some evidence that the City deprived the College of "all economically beneficial use" of its land. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992); *see also LeBlanc v. State, Through Dept. of Transp. and Development*, 626 So. 2d 1151 (La. 1993), *cert. denied*, ____ U.S. ____ (June 22, 1994) (highway construction that restricted access to property for seven months did not amount to a "taking"). The record shows that the College could have sold its property to at least two potential purchasers during the moratorium imposed by the City, a fact which makes any claim of a "categorical taking" ludicrous. Even if the College had lost all economically beneficial use of its property during the moratorium, beneficial uses existed after the moratorium expired.

More importantly, the College was legally free to continue to use its property for its existing, approved use as a college (even though it had run out of money and was *financially* unable to continue that use). The City cannot be held responsible for the College's precarious financial condition at the time of the moratorium.

B. *There Is No Evidence That The City's Actions Had Any Negative Economic Impact On The College.*

Under the *Penn Central* balancing test, the Court considers, *inter alia*, the economic impact of the

regulation on the landowner. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The record contains no evidence whatsoever that the moratorium had a negative economic impact on the College. In fact, foreclosure had begun on the College's mortgage *two years before* the moratorium took effect. The College simply failed to present evidence tying any of the College's financial problems to any act by the City. The Minnesota Court of Appeals, therefore, correctly affirmed the trial court's decision granting summary judgment to the City.

C. *The College's Motion To Remove The Trial Judge Was Untimely.*

The College contends that the trial judge should have recused herself from this action because her husband's brother was a likely witness. Rather than avail itself of the procedure for removal of a judge set forth in Minnesota Rule of Civil Procedure 63.03, however, the College based its two ill-timed removal motions on Minnesota's Code of Judicial Conduct. Its first such motion was brought in April 1991, over one year after the trial court's order dismissing the complaint. After the Minnesota Court of Appeals remanded the case to the trial court in December 1991, the College completed all discovery before the trial judge and waited *over 16 months*, until April 23, 1993, to renew its motion to remove. By that time, the trial judge's husband had died and there was no longer any family relationship on which to base the removal motion.

As both the chief judge of the district and the Court of Appeals noted, the College's delay "suggests . . . that the removal motion was brought to delay the trial or harass the city, rather than from a genuine concern for bias." Petition, pp. E5, I7. This matter does not raise any federal constitutional issue.

CONCLUSION

The College's Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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(612) 349-6171

Counsel for Respondent
City of Golden Valley

Dated: July 13, 1994.